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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~1042.~~ 6522 349 97

ROXANA SIMONTON, EXECUTRIX OF ROBERT F. SIMONTON, DECEASED, APPELLANT,

vs.

HIRAM SIBLEY AND PAUL P. WINSTON, ASSIGNEE IN BANKRUPTCY OF LANCASTER, BROWN & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

FILED OCTOBER 6, 1883.

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INDEX.

	Original.	Print.
Caption	1	1
Original bill	2	1
Exhibit A—Copy of agreement between Sibley, Simonton and Lancaster, Brown & Co	19	6
" B—Agreement as to profits	23	7
Prosecution bond	25	8
Subpœna	28	9
Order extending time to answer	30	10
Answer of Roxana Simonton	32	11
Replication	46	15
Notice of injunction	48	16
Injunction order	50	16
Order of reference	51	17
Notice to take testimony	53	18
Referee's minutes	54	18
Plaintiff's interrogatories to Sibley	56	19
" " Howard Saunders	61	20
" " John C. Mabin, R. A. Lancaster and Jas. O. Proudfit	63	21
Notice of filing interrogatories and marshal's return thereon	68	23
Exceptions to plaintiffs' interrogatories	70	24
Notice to Mrs. Simonton and marshal's return	72	24
Defendant's exceptions to plaintiffs' interrogatories propounded to R. A. Lancaster, J. C. Mabin and J. O. Proudfit	74	25

half interest in said bonds and stock for the sum of one hundred and thirty-five thousand six hundred and thirty-three dollars, and at the same time sold to the above-mentioned parties composing the firm of Lancaster, Brown and Company, one undivided fourth interest in the said bonds and stock for the sum of sixty-seven thousand eight hundred and seventeen dollars, and attained the remaining one-fourth interest in the said bonds and stock as and for his own property.

That by the terms of the said copartnership agreement, the sums so agreed to be paid by the said Robert T. Simonton and the said Lancaster, Brown and Company in purchase of the aforesaid interest in the said bonds and stock, were by them respectively
5 agreed to be paid to your orator, Hiram Sibley, on the fourteenth day of March, 1873.

That it was further agreed, and expressly understood at the time of said sale by and between your orator, Hiram Sibley, and the said Robert F. Simonton and the parties above mentioned, then composing the firm of Lancaster, Brown and Company, that your orator, Hiram Sibley, should retain and hold the said bonds and stock as collateral security for the purchase money which were due to him from the said Robert F. Simonton and Lancaster, Brown and Company respectively.

Your orators further show unto your honors, that by the terms of the said agreement of sale and partnership it was expressly agreed that your orator, Hiram Sibley, should have the privilege of selling the whole of said bonds and stock at his discretion, at any time, and applying the proceeds to the payment of the
6 said sums due to him as aforesaid, by the said Robert F. Simonton and the said Lancaster, Brown and Company respectively; a rebate of seven per centum per annum to be allowed, if said payments should be received before the said 14th of March, 1873.

Your orators further show unto your honors, that in and by the terms of said agreement of partnership and sale, it was further understood and agreed by and between your orator, Hiram Sibley, and the said Robert F. Simonton and the said Lancaster, Brown and Company, that your orator, Hiram Sibley, might, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end might employ counsel, the expenses to be by the parties in interest in proportion to their respective property and interest in said bonds.

That out of and from any profits that might be realized upon the said foreclosure, the sum of twenty-five thousand one hun-
7 dred and three dollars and seventy-five cents were to constitute a dividend and be set apart, one-third thereof to be paid to your orator, Hiram Sibley, another third to Lancaster, Brown and Company, and the remaining third to the said Robert F. Simonton. That any additional profit were to be divided be-

tween your orator, Hiram Sibley, the said Robert F. Simonton and the said Lancaster, Brown and Company in proportion to their respective shares and interest in the said bonds and stock as hereinbefore set forth, after payment of a debt to Lancaster, Brown and Company, amounting to the sum of $1,348.20, and a debt to the Western North Carolina Railroad Company for the sum of $881.27, which said debts were expressly assumed by the said copartnership.

Your orators further show unto your honors that it was also a part of said argument that any loss sustained by the said
8 copartnership should be borne by the said parties respectively in proportion to their respective interest and property in the said bonds and stock as hereinbefore stated. That it was also further expressed, understood, and agreed that, in case the proceeds realized from any sale of said bonds and stock, or from and upon the foreclosure above set forth, were insufficient to pay to your orator, Hiram Sibley, the sum of two hundred and seventy-one thousand two hundred and sixty dollars, that being the value and amount at which the aforesaid bonds and stock were estimated, then and in that case the deficiency should be contributed and made good by the respective partners, to wit, your orator, Hiram Sibley, the said Robert F. Simonton, and the said Lancaster, Brown and Company, in proportion to their and each of their aforesaid interest and property in the said bonds and stock, all of which will more fully appear, reference being had to
9 copies of said argument of sale and copartnership hereto attached as part of this bill of complaint and marked Exhibit A and B.

Your orators further show unto your honors that thereafter a suit was instituted on the equity side of the circuit court of the United States for the District of North Carolina, by your orator, Hiram Sibley, and another against the Western North Carolina Railroad Company, and others, to effect a foreclosure of the said mortgage of the said road executed in support of said mortgage bonds, and compass a sale thereunder; that during the course of the suit, the said Lancaster, Brown and Company, at the instance and request of the said copartnership, consisting as aforesaid of your orator, Hiram Sibley, the said Robert F. Simonton, and the said Lancaster, Brown and Company, paid divers large sums of money for
10 the use of said copartnership, which, in connection with the debt which had already been assumed by the said copartnership as due to the said Lancaster, Brown and Company as aforesaid, made the indebtedness of the said copartnership to the firm of Lancaster, Brown and Company, on the 31st day of October, 1874, amount to the sum of four thousand six hundred and ninety dollars and ninety-one cents; that of this last mentioned sum, the said copartnership did, on the 31st of October, 1874, pay to the said Lancaster, Brown and Company the sum of three thousand dollars.

And your orators further show unto your honors that your ora-

tor, Hiram Sibley, and the said Robert F. Simonton, and the said Lancaster, Brown and Company, constituting said copartnership as aforesaid, finding many vexatious delays in the prosecution of the said foreclosure suit, on the 31st of October, 1874, a sale was
11 effected of the bonds and stock above set forth, at and for the price of two hundred and seventy thousand dollars. That there was also realized and turned over to your orator, Hiram Sibley, upon the sale of said bonds and stock, one hundred and fifty thousand dollars, par value, of the capital stock of the Southern Railway Security Company, which your orator has held and still holds subject to distribution in accordance with the terms of said copartnership agreements.

Your orators further show unto your honors that said capital stock of the said Southern Railway Security Company has no market value.

And your orators further show unto your honors, that after said sale, and after all the assets of the said copartnership had been fully realized and expended in the payment of the debts due by said copartnership, there still remained due to your orator, Hiram
12 Sibley, on the 31st day of October, 1874, from the said copartnership a sum amounting at that time, principal and interest, to twenty-eight thousand five hundred and fifty-five dollars and ninety cents, of which sum the one-half thereof was and still remains due to the said cepartnership, by the said Robert F. Simonton.

And your orators further show unto your honors that there is still due and owing to your orator Hiram Sibley from the said copartnership, the sum of fourteen thousand two hundred and seventy-seven dollars and ninety-five cents, with interest from the 31st of October, 1874, which amount is also due to the said copartnership from the said Robert F. Simonton, or from his estate. And that there is still due to your orator Paul C. Winston, assignee of the late firm of Lancaster, Brown & Company, bankrupts as
13 aforesaid, from the said copartnership, the sum of eight hundred and forty-five dollars and forty-five cents, with interest thereon from October 31st, 1874; and that there is likewise due to the said copartnership the same amount from the said Robert F. Simonton, as and from his estate.

Your orators further show unto your honors that there are no other debts due from or to the said copartnership, and that, with the exception of the sums so due as aforesaid from the said Robert F. Simonton, the affairs of the said copartnership are wound up, adjusted, and settled.

And your orators further show unto your honors that, as they are advised and believe, the said Robert F. Simonton departed this life, in the county of Iredell and State of North Carolina, some time in the year 1876, leaving a last will and testament, by
14 which he appointed the defendant, Isabella Simonton, executrix and sole legatee of his estate and effects; that she has

duly qualified as such executrix, taken the estate of the said Robert F. Simonton into her possession, assumed the burthen of the execution of said will, paid off the debts of said estate, except those stated in this bill, and, as your orators are informed and so charge, has in her hands a large amount of assets belonging to the estate of her testator, amounting to many thousands of dollars, which are applicable to the payment of the debts thereof.

Your orators further show unto your honors that they have made demand upon the defendant Isabella Simonton for an account and settlement of the copartnership dealings, and for the payment of the amount so due as aforesaid; that your orator Hiram Sibley and the late firm of Lancaster, Brown & Company made de-
15 mand upon the said Robert F. Simonton in his lifetime for an account and settlement of the said partnership dealings, and for the payment by him to the said partnership of the amount so due by him as aforesaid, but that said demands were refused, as well by the said Robert F. Simonton in his lifetime, as by his said executrix since his death, both of whom have constantly refused to come to an account with your orator Hiram Sibley and the said Lancaster, Brown & Company while in existence, and with your orator Paul P. Winston, assignee as aforesaid, touching the said partnership dealings.

To the end therefore that the said Isabella Simonton, defendant, may, if she can, show why your orators should not have the relief hereby prayed, and may upon the corporal oath, and according to the best and utmost of her knowledge, remembrance, information
16 and belief, full, true, direct and perfect answer, make to the several interrogatories hereinafter numbered and set forth, that is to say:

First. What amount of assets, if any, of her testator, Robert F. Simonton, came into her hands?

Second. What amount of assets of said Robert F. Simonton remains undisposed of, and what amount of same have you disposed of in payment of debts and charges of administration?

Third. What amount of debts remains unsatisfied?

And to the end that an account may be taken of all and singular the dealings and transactions of the said copartnership from its commencement, and that the said defendant, Isabella Simonton, may be decreed to pay to your orators the sums which may be found due to them respectively from her, your orators hereby agreeing to pay to her whatever sum may be found upon taking the said account to be due her, and to the end that your
17 orators may have such other and further relief as the nature of the case may require, may it please your honors to grant unto your orators the United States writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said Isabella Simonton, defendant, commanding her on a day certain therein to be named, and under a certain penalty, to be and

appear in this honorable court, then and there to answer all and singular the premises, and to stand to, perform and abide such further order, direction and decree as may be made against her, and your orators, as in duty bound, will ever pray, &c.

WARD & JONES,
JONES & JOHNSTON,
Solicitors for Complainants.

Verification.

UNITED STATES OF AMERICA,
CITY, COUNTY, AND STATE OF NEW YORK, } *ss.*

18 Hiram Sibley, being duly sworn, says he is one of the complainants in the foregoing bill. That he has read the same and knows the contents thereof. That the same is true to the knowledge of this complainant, except the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

HIRAM SIBLEY.

Subscribed and sworn to before me this 28th day of February, 1877.

[SEAL.] CHARLES M. WILEY,
Notary Public, N. Y.

19 *Exhibit A.*

Lancaster & Co., Richmond, Va.

Brown, Lancaster & Co., Baltimore, Md.

Banking House of
LANCASTER, BROWN & Co.,
No. 1 Exchange Court, (Exchange Place, near Broadway,)

{ 5 ct. Int. Rev. Stamp. }

NEW YORK, *June 19th*, 1872.

R. A. Lancaster,
J. Wilcox Brown,
Jas. O. Proudfit,
J. Campbell Maben.

This agreement between Hiram Sibley, of Rochester, R. F. Simonton, of North Carolina, and Lancaster, Brown & Co., of New York, witnesseth: That the said Sibley agrees to sell to the said Simonton one-half interest in all his right and title to one million and fifty-seven thousand dollars of the first mortgage bonds of the Western North Carolina Railroad Company, now held by him (five hundred thousand dollars of said bonds being signed by only one trustee, and now in hands of Lancaster, Brown & Co. for safe

keeping, and eight thousand one hundred and fifty-eight shares of stock in said company, for the sum of one hundred and
20 thirty-five thousand six hundred and thirty-three dollars, payable on the 14th day of March, 1873, and the said Simonton agrees to buy the said interest and to pay as aforesaid, and the said Sibley also agrees to sell the said Lancaster, Brown & Co. one-fourth of all his right and title to the said bonds and stock, for the sum of sixty-seven thousand eight hundred and seventeen dollars, payable on 14th March, 1873, and the said Lancaster, Brown & Co. agree to buy the same and to pay as aforesaid. It is expressly understood that the aforesaid bonds and stock sold each party, are to be considered as held by Hiram Sibley as collateral security for the prompt payment of the said sums of money, and the whole amount of bonds and stocks shall be held together, and that neither party to this contract shall sell, or in any way dispose of the whole or any part of his interest in the same, without the consent of all of the other parties; but Hiram Sibley shall have the privilege of
21 selling the whole amount of both bonds and stock at his discretion at any time, and apply the proceeds to the payment of said sum due to him, allowing a rebate at the rate of seven per cent. per annum, if the payments shall be thus received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end may employ counsel, the charge for which shall be borne by the parties in interest, in proportion to the amount of bonds and stock held by each, and whatever the proceeds of said foreclosure may be, or if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by Hiram Sibley as collateral security for the pay-
22 ment of the aforesaid sums respectively.

{5 ct. Int. Rev. Stamp.}

HIRAM SIBLEY.
R. F. SIMONTON.
LANCASTER, BROWN & CO.

23 *Exhibit B.*

NEW YORK, *June* 20, 1872.

Mr. Hiram Sibley having this day sold to R. F. Simonton one-half of his interest in 1,057,000 1st mortgage bonds of the Western North Carolina R. R. Co., and eighty thousand one hundred and fifty-eight shares of the stock of said Co., and to Lancaster, Brown & Co. one-fourth interest in said bonds and stock, he, himself, holding the remaining one-fourth interest, it is mutually agreed between all the parties that from any profits arising from the sale, foreclosure, or any other disposition of said bonds and stock, $25,103.75

shall be first set apart, to be divided in three equal parts—Hiram Sibley, R. F. Simonton and Lancaster, Brown & Co. each to have one-third. From any profits remaining there shall be first paid to Lancaster, Brown & Co. the commissions paid by them for sale of bonds and tax, amt'g to $1,348.20, and to W. N. C. R. Co. $881.27,
due to said Co., and any balance remaining shall be divided as
24 follows: Hiram Sibley one-fourth, R. F. Simonton one-half, Lancaster, Brown & Co. one-fourth. In case of loss in this adventure, the amount due to L., B. & Co. of $1,348.20, and to W. N. C. R. Co. of $881.27, shall be paid by each of the parties in proportion to their interest, and in the same proportion any deficiency that may exist in the proceeds necessary to return to the said Sibley the sum of two hundred and seventy-one thousand two hundred and sixty-six dollars.

(5 cents Int. Rev. stamp, cancelled.)

HIRAM SIBLEY.
R. F. SIMONTON.
LANCASTER, BROWN & CO.

And, on the same day, to wit, March 5th, 1877, the said complainants file, in our said court, a bond for the prosecution of said cause, which bond is in the words and figures following, viz:

25 *Pro's Bond.*

Circuit Court, 4th Circuit. In Equity.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA.

HIRAM SIBLEY AND PAUL P. WINSTON, ASSIGNE OF Lancaster, Brown and Company, Bankrupts, Complainants,
against
ISABELLA SIMONTON, EXECUTRIX OF ROBERT F. SIMONTON, deceased, Defendant.

Know all men by these presents that we, Hiram Sibley, principal, and Hiram W. Sibley and Howard Saunders, of New York, sureties, are held and firmly bound unto the defendant in the above entitled action in the sum of three hundred dollars, for the payment of which we bind ourselves firmly by these presents. Sealed with our seals, and dated this twenty-eighth day of February, 1877.

The condition of the above obligation is such that whereas the said complainants, above named, have this day brought an
26 action, and filed their bill in equity against the defendant above named:

Now, if the said complainant shall fail to prosecute the said suit with effect or be cast therein, then, and in that event, if the above bounded Hiram Sibley, principal, and Hiram W. Sibley and Howard Saunders, of New York, sureties, shall pay, or cause to be

paid to the said defendant, all such costs and damages as shall be awarded, adjudged, and decreed to be recovered of and against the said complainants, then this obligation to be void, else to remain of full effect.

HIRAM SIBLEY. [SEAL.]
H. W. SIBLEY. [SEAL.]
HOWARD SAUNDERS. [SEAL.]

In presence of—
CH. M. WILEY.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.*

On this the 28th day of February, 1877, before me, personally come Hiram Sibley, Hiram W. Sibley, and Howard Saunders, to me respectively known, and known to be the persons described, and
27 who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

[SEAL.] CHARLES M. WILEY,
Notary Public, N. Y.

And thereupon at the request and by direction of the said complainants, by his solicitors aforesaid, a writ of subpœna was issued, in pursuance of the prayer of said bill of complaint, against the said defendant, returnable on the first Monday in April, A. D. 1877, which subpœna is in words and figures as follows, to wit:

28 *Subpœna.*

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA, } *ss.* Fourth Circuit.

The United States of America to Roxana Simonton, executrix of Robert F. Simonton, deceased, of the county of Iredell, and State of North Carolina:

We command you, and every one of you, that you appear before the Judges of our Circuit Court of the United States of America for the Western District of North Carolina, at the office of the clerk of the said court, in the town of Greensboro, in said district, on the first Monday in the month of April next, to answer the bill of complaint of Hiram Sibley, a citizen of the State of New York, Paul P. Winston, assignee of Lancaster, Brown and Company, citizens of Richmond, State of Virginia, said firm being composed of R. A. Lancaster, Phillip I. Wright, and J. L. Williams, citizens of State of Virginia, John Wilcox Brown, State of Maryland, J. C. Mebane and Jas. O. Proudfit, of the State of New York, filed in the clerk's office of said court, in said town of Greensboro, then

and there to recover and abide by such judgment and de-
29 cree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the western district of North Carolina to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States at Greensboro, in said district, the first Monday in October, 1876, and in the ninety —— year of the independence of the United States.

Issued the 10th day of March, 1877.

[SEAL.] JNO. W. PAYNE, *Clerk.*

On the said subpœna the following endorsement appears, viz:

"Received the 19th day of March, 1877; executed the 19th day of March, 1877, by leaving a copy hereof, together with a copy of the complaint, with Roxana Simonton, executrix of Robt. F. Simonton, dec'd, deft.

R. M. DOUGLAS,
U. S. Marshal.
By JNO. C. BARKLEY, JR.,
Special Deputy Marshal.

30 *Agreement extending time to file Answer.*

SALISBURY, N. C., *March 31st*, 1877.

JNO. W. PAYNE, ESQ.
Dear Sir—
In the case of

HIRAM SIBLEY AND OTHERS
vs.
ROXANA SIMONTON, EX'R'X,

You will please to enter the names of attorneys as follows: for defendant, Blackmer and Henderson, J. M. McCorkle. Also enter following by consent of both parties: "Deft. allowed till rule day in May to file answer, and if not otherwise notified the time will be extended till rule day in June for answer."

Yours truly,

LUKE BLACKMER,

Filed April 2nd, 1877.

JOHN W. PAYNE, *Clerk.*

And afterwards, to wit, on the 10th day of May, 1877,
31 the following further proceedings are had in said cause, in said circuit court: This day comes said defendant by her solicitors, T. S. Tucker, J. M. McCorkle, and Blackmer and Henderson, and files her plea and her answer to the said bill of com-

plaint, which said plea and answer are in the words and figures following, to wit:

32 *Answer.*

Circuit Court of the United States, Western District of North Carolina. In equity.

To the Honorable, the Judges of said Court:

In the case of Hiram Sibly and others against Roxana Simonton, executrix of Robert F. Simonton, the defendant reserving to herself all right of exception to the many errors in plaintiff's bill contained, answers and says:

The allegation relative to the copartnership and the parties composing it with their respective interest is believed to be correctly stated, but the allegation of plaintiff, Hiram Sibley, that he was the owner of eight thousand one hundred and fifty-eight shares of the capital stock of the Western N. C. R. Road Company is not admitted to be true, but is expressly denied, and the defendant states that she is informed and believes that the plaintiff, Hiram Sibley, did not at the time alleged, nor at any other time before or since own the 8,158 shares of stock referred to, or any part thereof.

33 Defendant is not enabled to or admit that her testator contracted to pay the sum alleged for a one-half interest in the bonds on said R. road, without obtaining at the same time a one-half interest in 8,158 shares of the capital stock of said W. N. C. R. R. Company.

Defendant admits that Hiram Sibley was, by the terms of the copartnership, authorized to retain and hold the property of the copartnership as collateral security for the purchase money due him by the other members of the company.

Defendant admits that Hiram Sibley was authorized to sell the property owned by the company at his discretion, at any time, and to settle up the copartnership. And defendant states that as Hiram Sibley, under this authority, did sell the property of the company, it was his duty then to have settled and closed up

34 the business of the company; and she alleges that, as she is informed and believes, if her testator had then, at the date of the sale of the bonds, received what was justly due him, he would have received a clarge sum of money as his share of the profits of the adventure.

Defendant admits that Hiram Sibley had the right, under the contract, to employ counsel, the expenses of which, as all other expenses of the company, were to be paid by him out of the profits of the adventure, if profits should result, but in case of loss upon the adventure, then all expenses were to be paid by the company in proportion to the interest of each member, but this defendant

charges that Hiram Sibley should have paid all attorneys' fees as well as all other expenses arising from the operations of the company, out of the large amount of profits he had in his possession after the sale by him of the bonds and the pretended sale
35 by him of 8,158 shares of the capital stock of the W. N. C. R. R. Co.

This defendant states that she had no knowledge of the amount the company owed to Lancaster, Brown & Co., nor of the amount owed elsewhere; but she again asserts that she has been informed and believes that Hiram Sibley had ample means arising from the sale of copartnership property to have paid off all charges against the copartnership of whatsoever character and amount they might have been and still have a surplus of the profits to divide, amounting to one hundred thousand dollars, or some other large sum.

This defendant denies that one hundred and fifty thousand dollars of the capital stock of the Southern Railway Security Company was turned over to Hiram Sibley as the property of his company, but she is informed and believes, and so charges, that Hiram Sibley received the one hundred and fifty thousand dollars
36 of capital stock of the Southern Railway Security Company as cash at its par value, or, if any discount whatever was allowed him on said stock, it was not exceeding two and one-half per cent., for she has been informed and believes, and so charges, that Hiram Sibley himself declared that he would rather have said Southern Railway Security Company's stock at (97½) ninety-seven and one-half per cent. than to have the cash, and hence it is immaterial to this defendant whether the Southern Railway Security Company's stock is valueless or otherwise.

This defendant denies that the said copartnership was indebted to Hiram Sibley, on the 31st day of October, 1874, after the sale of the said bonds, in the sum of twenty-eight thousand five hundred and fifty-five dollars and ninety cents, or any other amount. And she also denies that the testator, R. F. Simonton, was, on the 31st day of October, 1874, or at any other date, indebted to the plaintiff Paul P. Winston, assignee of Lancaster, Brown &
37 Co., in the sum of eight hundred and forty-five dollars and 45 cts., or any other sum, on account of the copartnership, Hiram Sibley having been required, by the terms of the copartnership, to pay all expenses incident to the adventure out of the profits that might be realized, and the profits were vastly larger than was necessary to enable Hiram Sibley to pay off all expenses, liabilities, and debts of the copartnership.

Defendant has no such information as will enable her to state whether there are any debts due to or from the copartnership, but she alleges that neither her testator in his lifetime was, nor his estate since his death is, indebted to said copartnership on account of said copartnership in any sum to any person or company whatever, but that said copartnership was, on the 31st of October, 1874,

indebted to her testator in the sum of from fifty to sixty thousand dollars, with interest from date at seven per cent., and that the same amount is still due to her testator's estate, and she is
38 unable to state the amount due her from plaintiff, Hiram Sibley, or from the copartnership with any greater accuracy, for the reason that Hiram Sibley has had the entire management of the copartnership adventure in his hands, and her information is derived from oft-repeated statements of her father and others, that a large amount is due her from Hiram Sibley, on the copartnership adventure, which she will endeavor to prove.

It is true as alleged in plaintiff's bill that Robert F. Simonton departed this life in the county of Iredell, State of North Carolina, in the year 1876; that he left a last will and testament in which he appointed this defendant executrix and sole legatee of his estate; that she has qualified as such executrix and taken the estate of the said R. F. Simonton into her possession, and has assumed the burthen of the execution of said will.

She submits that she has in hands a considerable amount
39 of assets and property that can be reduced to asssets, but she has been advised by her counsel and was informed by her testator, in his lifetime, that the estate was, and is, insolvent, and she believes such to be the fact; and, under such information and advice, she is treating the estate as insolvent; and she further states that she has no such amount of assets and property as will enable her to pay any of the debts of the estate in full, and she therefore respectfully asks of the honorable court that if any judgment or decree shall be rendered against her in this, that it may be restricted to a pro rata amount with all other creditors or debts of equal dignity.

Defendant denies most emphatically that either her testator in his life time, or herself as his executrix, ever refused to enter into a full and fair settlement of the copartnership dealings, for she
40 expressly asserts that her testator used all means in his power, short of a resort to the courts, in his lifetime, to effect a settlement, and she herself has been so anxious to effect a settlement of the business since her qualification as executrix that she has sent one of her attorneys and a competent witness with him to New York expressly for the purpose of making settlement; and she alleges, upon information and belief, that while a day, hour, and place certain were fully agreed upon and understood between her attorney and witness and the said Hiram Sibley, and he, the said Hiram Sibley, being, on the morning and day so agreed upon as the day of meeting, at the place, or in the immediate vicinity of the place where the meeting was to be held, left the said place by railway and went to some remote place without notice or excuse to the parties who had traveled so far to meet him. She says
41 now, as she has ever said, and as her testator said before his death, that she has ever not only been ready and willing,

but anxious to settle this business. She admits that she has denied the justice of the claims of plaintiffs, and has declined, under legal advice, to pay any part of them, asserting and believing that the copartnership is very largely indebted to her.

In answer to the direct interrogatories in plaintiffs' bill contained defendant says she is unable to state what amount of assets have gone into her hands, for the reason that she regarded the unsettled claim against Hiram Sibley, amounting to more than $50,000, as a part of the estate, and this claim being litigated and other large claims being denied and litigated, and many other debts due the estate turning out to be on insolvent parties, it is impos-
42 sible to tell with greater accuracy than a wild guess the amount of assets she has received that will prove solvent and available. But an approximate estimate of the assets of her testator's estate, including liquidated and unliquidated claims, solvent and insolvent claims, will reach from $130,000 to $140,000.

Defendant cannot answer the *second* direct interrogatory with any greater degree of accuracy than the *first*, but she can state that she has made payments upon indebtedness of the estate of her testator amounting to about $15,000, including therein some small portion of the costs and charges of administering the estate, but as to what amount of assets she has remaining she cannot state.

Defendant is unable to answer the *third* direct interrogatory with any degree of accuracy for the reason that a large amount of indebtedness is claimed as due from the estate; that she does
43 not recognize and will pay no part thereof, unless required so to do by a judgment or decree of some court having jurisdiction over her. The outstanding indebtedness of the estate, so far as known and recognized by her, is in the neighborhood of $60,000, but her statement of this must necessarily be inaccurate for the reason that she does not know how much interest is due on the indebtedness.

Defendant is now and ever has been ready to account and settle with plaintiffs, especially with Hiram Sibley, and she prays that judgment may be rendered in her favor and against the plaintiffs for such sum as may be found due in an equitable settlement, and for such other and further relief as may be meet and right. And to the extent of her ability as executrix of Robert F. Simonton she will stand to, abide by, and perform any judgment or decree of this court that may be rendered against her, and she prays that the plaintiffs may be required to do the same.

44 T. S. TUCKER,
J. M. McCORKLE,
BLACKMER & HENDERSON,
Solicitors for Deft.

UNITED STATES OF AMERICA,
STATESVILLE, IREDELL COUNTY,
STATE OF NORTH CAROLINA.

Roxana Simonton, being duly sworn, says she is the defendant named in the complainants' bill; that the same has been read to her, and she also knows the contents of the foregoing answer, and that the same is true, to the knowledge of this defendant, except the matters and things therein stated on information and belief, and as to those matters she believes it to be true.

ROXANA SIMONTON,
Executrix of R. F. Simonton.

Subscribed and sworn to before me this the fourth day of May, 1877.

[SEAL.] H. C. COWLES,
Clerk U. S. Circuit Court,
Western District of North Carolina, at Statesville.

45 And afterwards, to wit, June 5th, 1877, the complainants aforesaid file in our said court their replication in the words and figures, as follows, to wit:

46 *Replication.*

Circuit Court of the United States for the Western District of North Carolina. In equity.

HIRAM SIBLEY, PAUL P. WINSTON, ASSIGNEE of Lancaster, Brown & Co.,
against
ROXANA SIMONTON, EXECUTRIX OF ROBERT F. Simonton.

The replication of Hiram Sibley and Paul P. Winston, assignee, complainants, to the answer of Roxana Simonton, executrix, defendant.

These repliants, saving and reserving unto themselves, now and at all times hereafter, all and all manner of benefit and advantage of exceptions which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will ever maintain and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants, without this, that any other matter or thing whatsoever in the said answer contained,
47 material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true, all which matters and things these repliants are and will be ready to aver, maintain,

and prove, as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

JONES & JOHNSTON,
June, 1877. *Sol's for Compl'ts.*

And afterwards, to wit, on the 13th of June, 1877, a notice for injunction is filed in said cause, in the words and figures, as follows, viz:

48 *Notice for Injunction, &c.*

Circuit Court of United States, Western District of North Carolina.
In Equity. 4th Circuit.

HIRAM SIBLEY ET AL., COMPLAINANTS,
vs.
ROXANA SIMONTON, EX'R'X, DEFENDANT.

Take notice that *will* will move the circuit court on Tuesday, 13th day of June, 1877, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the office of the clerk of said court, in the city of Greensboro—

I. That a decree be made upon pleadings in above case referring it to the master to state an account of the partnership dealing between the complainants and the defendant's testator, and to report what parts, if any, of such personal estate are outstanding and undisposed of, what debts and all other matters.

II. For an injunction restraining the defendant from disposing of the assets and estate of her testator, except under the order of this court, to Messrs. Blackmer & Henderson & McCorkle,
49 sol's for def't.

And on said 13th day of June, 1877, a restraining order and order of reference are made in said cause, which said orders are in words and figures as follows, to wit:

50 *Restraining Order.*

Circuit Court of United States, Western District of North Carolina.

HIRAM SIBLEY ET AL.
vs.
ROXANA SIMONTON, EX'R'X.

The motion for an injunction in the above entitled cause coming on to be heard at chambers, the 12th day of June, 1877, the counsel for complainants and defendant being heard:

It is ordered at the hearing of this motion be continued till rule day in July, 1877.

And that the defendant, Roxana Simonton, executrix of the

estate of R. F. Simonton, be in the meantime restrained from making any disposition of said estate.

ROBT. P. DICK,
U. S. Dist. Judge.

Agreed.

JONES & JOHNSTON, *for Comp'ts.*
LUKE BLACKMER, *for Def't.*

51 *Order of Reference.*

HIRAM SIBLEY AND OTHERS
vs.
ROXANNA SIMONTON, EXECUTRIX OF Robert F. Simonton, dec'd.

This cause coming on to be heard upon the bill, answer and replication to the answer, and upon argument by counsel, the court doth declare that the partnership of Hiram Sibley, Lancaster, Brown & Co. and Robert F. Simonton, was formed for the purposes and in the manner stated in the bill of complaint, and that the plaintiffs are entitled to the account of the dealings of the said co-partnership as prayed therein; and therefore it is ordered by the court that it be referred to John W. Payne, clerk of this court, to state an account of the dealings of the said copartnership, and particularly to ascertain and report what amount, if any, is due and owing to the said copartnership by the defendant Roxanna
52 Simonton, executrix of Robert F. Simonton, dec'd. Also what amount, if any, is due and owing to the said copartnership by the plaintiff Hiram Sibley, and also what amount is due and owing to the said copartnership by Paul P. Winston, assignee in bankruptcy of Lancaster, Brown & Co. It is further ordered that he ascertain and report what amount, if any, is due and owing by said copartnership to the partners respectfully; that is, to Hiram Sibley, to Paul P. Winston, assignee as aforesaid, and to Roxanna Simonton, executrix as aforesaid; also to report what amount of assets is owned by the copartnership, and the value thereof; and also to ascertain and report what debts are due by the said copartnership to persons other than the partners themselves, and to whom due. It is further ordered that this cause be reserved for further directions upon the coming of the report of the master.

JNO. W. PAYNE, *Clerk.*

Filed July 13th, 1877.

53 And on August 20th, 1877, the following notice to take testimony is filed, viz:

Notice to take Depositions.

In Circuit Court of U. S., Western District of N. C.

HIRAM SIBLEY ET AL.
vs.
ROXANNA SIMONTON, EXRX. OF R. F. Simonton.

To Blackmer & Henderson and J. M. McCorkle, att'ys for defendant in the above named action.

You are hereby notified that I shall proceed, at my office, in Greensboro, on Monday the 20th inst., at 12 o'clock M., to take and record such proper evidence as the plaintiff may then and there offer in the above entitled cause, when and where you, as counsel for said defendant, should appear.

August 13, 1877. JNO. W. PAYNE,
Referee and Clerk.

54 *Referee Minutes.*

HIRAM SIBLEY ET AL.
vs.
MRS. ROXANNA SIMONTON, EXRX. OF R. F. Simonton.

In obedience to an order heretofore made in the above cause, I notified the plaintiff and defendant that I would, at my office in Greensboro, on Monday, August 20, 1877, proceed to take and record such competent proofs as the plaintiff should then and there offer, at which time and place the plaintiff was represented by his att'ys, Messrs. Jones & Johnston, and def'ts by Messrs. Blackmer and McCorkle, when and where the following papers were filed by plaintiffs, marked A, being a copy of a letter from R. A. Lancaster to R. F. Simonton; one marked B, copy of a letter from R. F. Simonton to R. A. Lancaster; "C," copy of an account of Western N. C. R. R. Co. with Lancaster, Brown & Co.; "D," copy of the *estate* of R. F. Simonton with Hiram Sibley.

Whereupon commission adjourned until day of 187 .

55 JNO. W. PAYNE,
Commissioner.

And afterwards, to wit, June 5th, 1878, the plaintiffs are filed in the words and figures following, viz:

56 *Interrogatories in behalf of Pl'ff.*

Circuit Court of United States, Western District of North Carolina. In equity.

HIRAM SIBLEY AND PAUL P. WINSTON, ASSIGNEE OF Lancaster, Brown & Co., complainants,
against
ROXANNA SIMONTON, EXECUTRIX OF ROB'T F. SIMONTON, dec'd, defendant.

Interrogatories to be propounded to Hiram Sibley in the above-entitled cause, in behalf of complainants.

Int. 1. State your name, age, occupation, and place of residence?

Int. 2. State if you were joint owner with the late Robert F. Simonton, of North Carolina, and the firm of Lancaster, Brown & Co., of one million and fifty-seven thousand dollars of the first mortgage bonds of the Western North Carolina Rail Road Company, and of eight thousand one hundred and fifty-eight (8,158) shares of the capital stock of the said company?

57 Int. 3. State if you sold the said bonds and stock; if so, to whom, at what time, on whose account, and what you received for the same in money or otherwise?

Int. 4. State if you, at any time previous to the final sale of the said stock and bonds, made any contract for the sale of the same. If you say yes, and said contract was in writing, attach the original thereof to your deposition, and explain why the same was not executed?

Int. 5. State if you received any money or other securities upon the contract last mentioned; if so, state what you received, how you received them, and upon what account?

Int. 6. State what was the value of said securities, if any were received, at the time of their reception, and also what their present value is, and what disposition you have made of them?

Int. 7. Explain why the contract hereto attached with R. T. Wilson and the East Tennessee, Virginia, and Georgia Railroad Company recites the receipt of one hundred thousand dollars

58 upon the contract?

Int. 8. State if at the time you sold the interest in the stock and bonds of the Western North Carolina Railroad Company your were the owner of said stock?

Int. 9. State what was the market value of the stock of the Western North Carolina Railroad Company on the 19th June, 1872?

Int. 10. State what is the value of said stock at this time?

Int. 11. State if the said stock has had any market value at any time since the 19th June, 1872?

Int. 12. If you say that you were the owner of the eight thousand one hundred and fifty-eight (8,158) shares of the said stock at

the time you sold an interest in the same to R. F. Simonton and Lancaster, Brown & Co., state from whom you obtained them, at what time, and all the circumstances connected therewith?

Int. 13. State if the agreement between Lancaster,
59 Brown & Co., R. F. Simonton, and yourself in relation to the joint adventure in the Western North Carolina bonds and stock was in writing; if so, attach the original to your deposition and identify it?

Int. 14. State if any other agreement or agreements in writing was entered into between yourself, Lancaster, Brown & Co., and R. F. Simonton, in relation to such joint adventure of same date as copartnership agreement, or subsequent thereto; if so, attach the original thereof to your answer properly identified?

Int. 15. State whether any power of attorney or other instrument in writing, in relation to the subject-matter of the joint adventure was ever executed and delivered to you by Lancaster, Brown & Co. and R. F. Simonton; if so, attach the original thereof to your answer and identify the same?

Int. 16. State if you saw said R. F. Simonton and Lancaster, Brown & Co., sign any of the several agreements and in-
60 struments attached to your answer; if so, what instrument or agreement did they sign?

Int. 17. State if you are acquainted with the handwriting of R. F. Simonton. If so, state what your opportunities for knowing his handwriting were?

Int. 18. State if the signature purporting to be R. F. Simonton's to the instrument or agreement attached to your answer are the genuine signatures of R. F. Simonton?

Int. 19. Do you know, or can you set forth, any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

JONES & JOHNSTON,
Sols. for Complainant.

Filed June 5th, 1878.

JNO. W. PAYNE, *Clerk.*

61 Interrogatories to be propounded Howard Saunders by plaintiff in the suit of Hiram Sibley and others against Roxanna Simonton, executrix of R. F. Simonton, dec'd.

Int. 1. State your name, age, occupation, and place of residence?

Int. 2. State if you were in the employment of the late firm of Lancaster, Brown & Co. If so, state in what capacity and during what period?

Int. 3. Examine the account hereto attached, and also examine the books of Messrs. Lancaster, Brown & Co., and say if the said

account is a correct statement of the account of the copartnership of R. F. Simonton, Hiram Sibley, and Lancaster, Brown & Co., in account with Lancaster, Brown & Co., as the same appears upon the books of the last named firm?

Int. 4. State, if you know, whether the amounts therein set forth were paid by Lancaster, Brown & Co. for the said copartnership?

62 Int. 5. State if you ever exhibited the said account to Mr. Robert F. Simonton, and if so, state if he made any objection thereto?

Int. 4. Do you know, or can you set forth, any matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matter in question in this cause? If yea, set forth same fully and at large in your answer?

JONES & JOHNSTON,
Sols. for Complts.

Filed June 5th, 1878.

JNO. W. PAYNE, *Clerk.*

63 Circuit Court of United States, Western District of North Carolina. In equity.

HIRAM SIBLEY AND PAUL P. WINSTON, Assignee of Lancaster, Brown & Co., Complainants.
against
ROXANA SIMONTON, EXECUTRIX OF ROBT. F. Simonton, dec'd, defendant.

Interrogatories to be propounded to Robert A. Lancaster, John C. Mabin and James O. Proudfitt in the above entitled cause in behalf of complainants.

Int. 1. State your names, ages, places of residence and occupations?

Int. 2. What was your occupation during the years 1872, 1873, 1874 and 1875?

Int. 3. State if you were a member of the firm of Lancaster, Brown & Co., New York city; if so, when did you become a member of the firm, and when did you cease to be a member of the firm?

64 Int. 4. State whether your firm was a party to the joint adventure in Western North Carolina Railroad bonds and stock with Hiram Sibley and R. F. Simonton, of North Carolina?

Int. 5. Examine the agreement and instrument in writing attached to the deposition of Hiram Sibley, identify the same as they are identified in the said deposition, and state whether you were

present at the execution of the same or any of them; if so, which ones, and state by whom they were signed?

Int. 6. If you were not present when said instruments in writing or agreements were signed, examine them and state in whose handwriting the signatures are.

Int. 7. State if you know the handwriting of any of the said parties?

Int. 8. State what your opportunities were for knowing their handwriting?

Int. 9. State what relation your firm held towards the par-
65 ties interested in the joint adventure during the time attempt was made to sell the said bonds or after the sale?

Int. 10. State whether your firm had any communications or correspondence with R. F. Simonton in relation to the joint adventure in the Western North Carolina Railroad bonds, before or after the sale to Wilson? If you say yea, attach to your deposition copies of all letters written by your firm to said R. F. Simonton, with the original answers received thereto from said R. F. Simonton?

Int. 11. State whether any of the letters written by your firm, and mailed to R. F. Simonton, Statesville, N. C., enclosed a statement of the account of the parties interested in said joint adventure in the Western North Carolina bonds. If you say yea, attach to your answer a copy of the letter so written, together with the accompanying statement, and the original of any answer or answers received by your firm thereto from said Simonton?

66 Int. 12. State whether you or any one else in your presence had any conversation with R. F. Simonton in reference to the state of accounts between the parties to the said adventure. If so, state what it was, and whether any objection was made by Simonton to the account so rendered?

Int. 13. Examine the account hereto attached, purporting to be an account of dealings of the copartnership of R. F. Simonton, Hiram Sibley, and Lancaster, Brown & Co., with the last named firm, and state if the said account is correct?

Int. 14. State if the several sums charged therein as having been paid by Lancaster, Brown & Co. on account of the said copartnership were so paid?

Int. 15. State if Hiram Sibley paid said firm any portion of said sum so due, and if so, what?

Int. 16. Do you know, or can you set forth, any other
67 matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

JONES & JOHNSTON,
Sols. for Complainants.

Filed June 5th, 1878.

JNO. W. PAYNE, *Clerk.*

And afterwards, to wit, June 8th, 1878, the following notice of filing interrogatories is issued in said cause, which said notice, with the marshal's return thereon, is in words and figures as follows, viz:

68 *Notice of filing Interrogatories.*

In the Circuit Court of United States, Western District of North Carolina.

HIRAM SIBLEY AND PAUL P. WINSTON, Assignee of Lancaster, Brown & Co., Complainants,
against
ROXANA SIMONTON, EXECUTRIX OF R. F. SIMonton, dec'd, Defendant. } In equity.

To R. M. Douglass, Marshal of the Western District of North Carolina:

You are hereby commanded to deliver to Luke Blackmer, esq., one of the counsel for the defendant in the above-named case, the notice herewith sent that the complainants have filed certain interrogatories in above cause in the clerk's office of aforesaid court at Greensboro, N. C., and you will also deliver to him the certified copy of the interrogatories herewith sent, that he may file his cross-interrogatories, that the proofs in the above case may be taken.

Witness John W. Payne, clerk of said court, at office, in
69 Greensboro, June 8th, 1878.

[SEAL.] JNO. W. PAYNE, *Clerk.*

Special Deputation of D. L. Bingle.

OFFICE OF U. S. MARSHAL,
GREENSBORO, *June 10th*, 1878.

I hereby depute D. L. Bingle to execute the annexed process, namely: Notice and copy of interrogatories for Luke Blackmer, Esq., in the case of Hiram Sibley et al. vs. Roxanna Simonton, executrix.

No. 4. R. M. DOUGLAS, [L. S.]
U. S. Marshal.

Marshal's Return.

Executed June 11th, 1878, by delivering to Luke Blackmer, Esq., the notice and copy of interrogatories which was enclosed herein.

R. M. DOUGLAS,
U. S. Marshal.
By D. L. BINGLE,
Deputy Marshal.

witness at the execution of the same or any of them, if so, which ones and into by which they were signed?

Int. 6. If you were present when said instruments in writing or agreements were signed, examine them and state in whose handwriting the signatures are.

Int. 7. State if you know the handwriting of any of the said parties.

Int. 8. State what your opportunities were for knowing their handwriting.

Int. 9. State what, in addition, your firm said towards the parties interested in the joint adventure during the time attempt was made to sell the said bonds or after the sale?

Int. 10. State whether your firm had any communications or correspondence with C. F. Simonton in relation to the joint adventure in the Western North Carolina Railroad bonds, before or after the sale to Vilbert? If you say yea, state in your deposition copies of letters written by your firm to said C. F. Simonton, with the original answers received thereto from said C. F. Simonton?

Int. 11. State whether any of the letters written by your firm, and mailed to C. F. Simonton, Statesville, N. C., enclosed statements of the account of the parties interested in said joint adventure in the Western North Carolina bonds. If you say yea, attach to your answer a copy of the letters written, together with the accompanying statement, and the original or any answer or answers received by your firm thereto from said Simonton?

Int. 12. State whether you or any one else in your presence had any conversation with C. F. Simonton in reference to the state of accounts between the parties to the said adventure. If so, state what was, and whether any objection was made by Simonton to the account as rendered?

Int. 13. Examine the account hereto attached, purporting to be a account of dealings of the copartnership of C. F. Simonton, Hiram Sibley, and Lancaster, Brown & Co., with the last named firm, and state if the said account is correct?

Int. 14. State if the several sums charged therein as having been paid by Lancaster, Brown & Co. on account of the said copartnership were so paid?

Int. 15. State if Hiram Sibley paid said firm any portion of said sum so due, and if so, what?

Int. 16. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

JONES & JOHNSTON,
Sols. for Complainants.

From June 5th, 1878.

JNO. W. PAYNE, *Clerk.*

And afterwards, to wit, June 8th, 1878, the following notice of filing interrogatories is issued in said cause, which said notice, with the marshal's return thereon, is in words and figures as follows, viz:

68 *Notice of filing Interrogatories.*

In the Circuit Court of United States, Western District of North Carolina.

HIRAM SIBLEY AND PAUL P. WINSTON, Assignees of Lancaster, Brown & Co., Complainants, *against* ROXANA SIMONTON, EXECUTRIX OF R. F. SIMONTON, dec'd, Defendant. } In equity.

To R. M. Douglass, Marshal of the Western District of North Carolina:

You are hereby commanded to deliver to Lake Blackmer, esq., one of the counsel for the defendant in the above-named case, the notice herewith sent that the complainants have filed certain interrogatories in above cause in the clerk's office of aforesaid court at Greensboro, N. C., and you will also deliver to him the certified copy of the interrogatories herewith sent, that he may file his cross-interrogatories, that the proofs in the above case may be taken.

Witness John W. Payne, clerk of said court, at office, in
69 Greensboro, June 8th, 1878.

[SEAL.] JNO. W. PAYNE, *Clerk.*

Special Deputation of D. L. Bingle.

OFFICE OF U. S. MARSHAL,
GREENSBORO, *June* 10th, 1878.

I hereby depute D. L. Bingle to execute the annexed process, namely: Notice and copy of interrogatories for Lake Blackmer, Esq., in the case of Hiram Sibley et al. vs. Roxanna Simonton, executrix.

No. 4. R. M. DOUGLAS, [L. S.]
U. S. Marshal.

Marshal's Return.

Executed June 11th, 1878, by delivering to Lake Blackmer, Esq., the notice and copy of interrogatories which was enclosed herein.

R. M. DOUGLAS,
U. S. Marshal.
By D. L. BINGLE,
Deputy Marshal.

70 Defendants files the following exceptions to interrogatories, to wit:

CIRCUIT COURT OF THE UNITED STATES,
WESTERN DISTRICT OF NORTH CAROLINA.

PAUL P. WINSTON, ASSIGNEE OF LANCASTER, Brown & Co., Complainants,
against
ROXANNA SIMONTON, EXECUTRIX OF R. F. Simonton, dec'd, Defendant. } In Equity.

Deft's Exception to Interrogatory.

Exceptions by the defendant to the interrogatories to be prepounded to Hiram Sibley.

1. The defendant excepts to interrogatory second, in this, that said deponent is incompetent to depose to any communication or transaction with the defendant's testator.

2. The deft. excepts to interrogatories sixteenth, seventeenth, and eighteenth, in this, that said deponent is incompetent to depose to having seen deft's testator sign the paper referred to in said interrogatories, or to any transaction with defendant's testator relative to testator's handwriting, or to witnesses' means of knowing testator's handwriting.

71 3. The defendant excepts to interrogatory nineteenth, in this, that deponent is incompetent to testify to any communication or transaction with deft's testator.

Cross-interrogatory 1st. Did you not execute the original of an exhibit hereto attached, and marked A?

FOLK, BLACKMER & HENDERSON,
McCORKLE & TUCKER,
Sols. for Defendant.

And afterwards, to wit, June 8th, 1878, a notice to the defendant is issued, which said notice and the marshal's return thereon is in words and figures following, viz:

72 *Notice to Mrs. Simonton.*

In the Circuit Court of U. S., Western District of North Carolina.

HIRAM SIBLEY ET AL.
against
ROXANNA SIMONTON, EX'RX OF R. F. SIMONTON. } In Equity.

To R. M. Douglas, marshal of the Western District of North Carolina:

You are hereby commanded to deliver to Mrs. Roxanna Simonton, of Statesville, N. C., if to be found in your district, the notice

certified, which is herewith sent, notifying her that she comply with said request.

Witness John W. Payne, clerk, &c., of said court.

June 8th, 1878.

[SEAL.] JNO. W. PAYNE, *Clerk.*

73 *Special Deputation of P. L. Rose.*

OFFICE OF U. S. MARSHAL,
GREENSBORO', *June 10th* 1878.

I hereby depute P. L. Rose to execute the annexed process, namely: Notice to Roxanna Simonton, executrix in the case of Hiram Sibley et al. vs. Roxanna Simonton, executrix.

No. 5. R. M. DOUGLAS, [L. S.]
U. S. Marshal.

Marshal's Return.

Executed June 12th, 1878, by delivering to Mrs. Roxanna Simonton the notice which was enclosed herein.

R. M. DOUGLAS,
U. S. Marshal.
By P. L. ROSE, *S. D. M.*

The defendant, through her counsel, files the following exceptions to interrogatories to be propounded to R. A. Lancaster, J. C. Mabin, and J. O. Proudfit, to wit:

74 *Deft's Exceptions to Interrogatories to be propounded to R. A. Lancaster, J. C. Mabin, and J. O. Proudfit.*

HIRAM SIBLEY AND OTHERS
against
ROXANNA SIMONTON, EX'R'X OF R. F. Simonton.

Exceptions by the defendant to the interrogatories to be propounded to Robert A. Lancaster, John C. Mabin, and James O. Proudfit.

1. The deft. excepts to interrogatory five, six, seven, eight, nine, ten, and eleven, and twelve, because it is incompetent for said deponents to depose to any communication or transaction with deft's testator, to any means deponents may have had of knowing testator's handwriting, to any letters written to deft's testator, or to any conversation of any kind touching the matters in controversy with defendant's testator.

2. The defendant excepts to interrogatories thirteen, fourteen, fifteen, because deponents are incompetent to depose to any com-

munication or transaction with deft's testator, or to any matters of account or dealings between deponents or the firm of which
75 they were members with deft's testator, as alleged in said interrogatories.

3rd. The deft. excepts to interrogatory sixteen if the answers thereto require deponents to speak of any communication or transaction with deft's testator.

FOLK, BLACKMER & HENDERSON,
McCORKLE & TUCKER,
Solrs. for Defts.

Cross-interrogatories to be propounded to Howard Saunders.

1st. Had you any interest in the late firm of Lancaster, Brown & Co. when you were in their employment, or have you acquired any interest since your employment, or have you now or ever had any interest in the adventure of the Western North Carolina Rail Road bonds, in which Hiram Sibley, and Lancaster, Brown & Co., and R. F. Simonton were interested?

2. If deponents respond yes, then defendant excepts to each and all the interrogatories after interrogatory one, because deponent is incompetent to depose to any transaction or communication
76 of deft's testator.

FOLK, BLACKMER & HENDERSON,
McCORKLE & TUCKER,
Solrs. for Deft.

Filed June 13th, 1878.

JOHN W. PAYNE, *Clerk.*

And afterwards, to wit, on the first day of November, 1878, a commission to take depositions in said cause is issued, which commission and depositions thereunder, and exhibits attached, are in the words and figures, as follows, viz:

77 *Commission to take Depositions.*

Circuit Court. October Term, 1878.

STATE OF NORTH CAROLINA,
WESTERN DISTRICT OF NORTH CAROLINA. }

To Charles Nettleson, 150 Broadway, New York City, greeting:

We, reposing special trust and confidence in your integrity, do authorize and empower you to cause to appear before you, at such time and place as you may appoint, and on oath to examine touching all such matters and things as shall know of and concerning a certain matter of controversy in our United States Circuit Court for the Western District of North Carolina, now pending, wherein Hiram Sibley and another are plaintiffs, and

Roxanna Simonton, executrix of R. F. Simonton, is defendant, and the deposition in writing by you so taken, the same to transmit, sealed with your seal, to our U. S. circuit court to be held for the Western District of North Carolina, on the first Monday in
78 December next.

Witness John W. Payne, clerk of said court, at office in Greensboro, 1st day of November, Anno Domini, 1878.

[SEAL.] JNO. W. PAYNE, *Clerk.*

79 In the Circuit Court of the United States for the Western District of North Carolina.

HIRAM SIBLEY AND ANOTHER, PLAINTIFFS,
vs.
ROXANNA SIMONTON, EXECUTRIX OF ROBERT F. SIMONTON, DEC'D, DEFENDANT.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.*

Depositions of witnesses taken before me, pursuant to the annexed commission.

I hereby certify, that on the 27th day of November, A. D. 1878, at my office at No. 150 Broadway, in the city, county and state of New York, before me, Charles Nettleton, the commissioner named and appointed in and by the annexed commission, between the hours of 10 o'clock A. M. and 5 o'clock P. M. of that day, the witness, Hiram Sibley, named in the annexed commission, personally come before me, and he being then of lawful age and sound mind, he was then by me first duly examined, cautioned and sworn
80 to tell the truth, the whole truth and nothing but the truth, of his knowledge of the matters in controversy in the above entitled cause of Hiram Sibley *et al*, plaintiffs, against Roxana Simonton, executrix of Robert F. Simonton, deceased, pending in the Circuit Court of the United States for the Western District of North Carolina, and being so sworn, the said Hiram Sibley testified as follows, viz:

1st. In answer to the first interrogatory he says: My name is Hiram Sibley; I am twenty-one years of age; I am a farmer by occupation, and reside at the city of Rochester, in the State of New York.

2d. In answer to the second interrogatory he saith: I was the joint owner with the late Robert F. Simonton and Lancaster, Brown & Co. of $1,057.000 $\frac{00}{100}$ of the first mortgage bonds of the Western North Carolina Railroad Company, and of an assignment of a certificate of 8,158 shares of the capital stock of the
81 same company, owned and held by various shareholders and by them assigned to S. McD. Tate, and by said Tate assigned to me.

3d. To the third interrogatory he answers and says: I sold the interest of Simonton, Lancaster, Brown & Co. and myself in said bonds and stock on the 31st day of October, 1873, to Edward Mathews, of the city of New York, and received in payment therefor the promissory notes of said Mathews for the sum of two hundred and seventy thousand ($270,000) dollars, secured by a second mortgage given to me by said Mathews on real property, situate in the city of New York.

4th. To the fourth interrogatory he answers and says: I entered into a contract in writing, dated November 7th, 1872, with R. T. Wilson and The East Tennessee, Virginia and Georgia Railroad Company, for the sale of the said bonds and stock, which
82 contract is annexed hereto and marked "Exhibit A," "November 27th, 1878, C. N. Court."

The reason why the contract was not executed or fully performed is that said R. T. Wilson and said last named railroad company as well as the Southern Railway Security Company, to whom the said Wilson had assigned his interest therein, failed to keep and perform the provisions of that contract on the part of said Wilson and said railroad company.

5th. To the fifth interrogatory he answers and says:

I received no money upon the contract last mentioned. I received one hundred thousand dollars par value of the capital stock of the Southern Railway Security Company and no more, for account of myself, R. F. Simonton, and Lancaster, Brown & Co.

6th. To the sixth interrogatory he answers and says:

There was no market value of that stock at the time I received it. The highest price that I know of that stock selling since
83 that day, was 25 per cent. I have heard of no higher price, and that price only for comparatively small lots.

On the 31st of October, 1874, I received a dividend of three and one-half per cent. in cash on the stock of the Southern Railway Security Company, amounting to thirty-five hundred dollars. A stock dividend of fifty per cent. was also made, making the amount of the stock one hundred and fifty thousand dollars.

The dividend of thirty-five hundred dollars above named was all the money that I have ever received on account of the said stock, and it has been credited in my account rendered under date of October 31st, 1874.

The Southern Railway Security Company stock, amounting to one hundred and fifty thousand dollars, has not been sold and is still in my hands for distribution. I do not regard it as of any value.

7th. To the seventh interrogatory he answers and says:

The reason why the contract named in this interrogatory
84 recites the receipt of one hundred thousand dollars, is that it was so stated at the special request of R. T. Wilson, who desired to have that amount appear in the contract as the sum paid

thereon, instead of the actual payment made by the stock of the Southern Railway Security Company.

8th. To the eighth interrogatory he answers and says:

My interest in said stock consisted in an assignment to me of a certificate of eight thousand one hundred and fifty-eight shares of the capital stock of said company, owned and held by various shareholders, and by them assigned to S. McDonald Tate, and by the said Tate assigned to me, which assignment was procured from Mr. Tate (by Mr. Simonton, in pursuance of an agreement made to me by Simonton to induce me to buy the bonds. Mr. Simonton was present when the assignment was delivered to me by Mr. Tate, and saw the instrument and approved of it, and said it was right.)

(Ruled out.)

9th. To the ninth interrogatory he answers and says:

85 That the stock of the Western North Carolina Railroad Company had no value on the 19th day of June, 1872.

10th. To the tenth interrogatory he answers and says:

That said stock has no value at this time.

11th. To the eleventh interrogatory he answers and says:

That the said stock has had no market value at any time since the 19th of June, 1872.

12th. To the twelfth interrogatory he answers and says:

(I obtained the certificate for the eight thousand one hundred and fifty-eight shares of stock from S. McD. Tate on or about the 12th day of April, 1872, in the manner described in my answer to the eighth interrogatory. The certificate was left with Lancaster, Brown & Co. for safe keeping, and it has been lost or mislaid.)

(Excluded, except date.)

13th. To the thirteenth interrogatory he answers and says:

That the agreement between Lancaster, Brown & Co., R. F. Simonton, and myself, in relation to the joint adventure,

86 was in writing, and dated July 19th, 1872, and is hereunto annexed.

(Excluded.)

The witness here produced the said original agreement, which is hereunto annexed, and marked "Exhibit B, C. N., Comr., Nov. 27th, 1878," and the said witness says "that the said agreement is the original one."

14th. To the fourteenth interrogatory the witness answers and says:

There was another agreement between Lancaster, Brown & Co., R. F. Simonton, and myself, dated June 20th, 1872, which is hereto annexed. Here the witness produced an original paper dated June 20th, 1872, and says that the same is the original agreement called for in interrogatory number fourteen, and identifies as such original. The said paper is hereunto annexed, and marked "Exhibit C, C. N., Comr., November 27th, 1878."

(Excluded.)

15th. To the fifteenth interrogatory he answers and says:

A power of attorney in writing, in relation to the subject-matter of the joint adventure, was executed and delivered to me by
87 Lancaster, Brown & Co. and R. F. Simonton. It is dated October the 3rd, 1874, and is hereunto annexed. The witness here produces a paper writing, and says: It is the said power of attorney, and is the original one, and I now identify as such. Said exhibit is hereto annexed, and marked "Exhibit D, C. N., Comr., Nov. 27th, 1878."

(Excluded.)

16th. To the 16th interrogatory he answers and says:

I was present when the two contracts above named, June 19th and June 20th, 1872, were executed, and saw R. F. Simonton and Lancaster, Brown & Co. sign them.

They have already been identified by me on this examination and marked Exhibits "B" and "C," November 27th, 1878, C. N., Com'r."

17th. To the 17th interrogatory he answers and says:

I am well acquainted with the handwriting of R. F. Simonton; I have frequently seen him write and have received letters
88 from him.

18th. To the 18th interrogatory he answers and says:

The signatures purporting to be R. F. Simonton's to the instruments or agreements attached to my answers are the genuine signatures of R. F. Simonton.

19th. To the 19th interrogatory he answers and says:

Mr. Simonton was present in New York, and with Lancaster, Brown & Co. acting as his agents, personally urged me to purchase the bonds and take an assignment of the shares of stock from Mr. Tate, and agreed as an additional inducement to take an interest in the purchase as subsequently defined by the contract entered into which I have already identified and is marked Exhibit "B," Nov. 25th, 1878, C. N., Com'r."

Mr. Simonton, after the execution of the contract of June 19th, 1872, personally urged me to proceed under the authority given in the said contract to effect a sale of the bonds, and stated to me that Lancaster, Brown & Co. would act as his agents in all mat-
89 ters relating to the same. An effort was made to negotiate a contract for a sale of the bonds with General George W. Cass, then acting as the agent of R. T. Wilson in Europe, by the terms of which contract a payment down of one hundred thousand dollars was provided for.

This contract Mr. Wilson, upon his return, declined to execute; but subsequently offered to pay down one hundred thousand dollars of the stock of the Southern Railway Security Company, as an earnest of good faith and to enter into a contract to undertake a consolidation of the Western North Carolina Railroad with the North Carolina Railroad, and to pay two hundred and seventy thousand dollars for the bonds and certificate of stock belonging to

Simonton & Lancaster, Brown & Co. and myself, out of the first proceeds of bonds, to be placed upon the consolidated property, but reserving to himself and his successors the right to be relieved of all liability, under the contract, in the event of failure to
90 effect a consolidation and sale of the bonds within two years.

Mr. Wilson, or the Southern Railway Security Company, which, under the terms of the contract, was properly subrogated to his position, failed to comply, and the Wilson contract expired by its own terms, and I subsequently effected a sale of the bonds and of the certificate of stock to Edward Matthews, for the same sum of two hundred and seventy thousand dollars.

The Southern Railway Security Company stock, forfeited to me under the Wilson contract and its proceeds, except as heretofore stated, remained in my hands. It was my wish to realize at once upon the stock of the Southern Railway Security Company, and I frequently urged the sale of the same.

Lancaster, Brown & Co., for themselves, and in their capacity as agents for Mr. Simonton, did not deem it advisable to offer the stock for sale, and so stated during various interviews and
91 in their letter to H. F. Atkinson, my financial agent, of August 15th, 1873, hereunto attached, and to which I refer.

The witness here produces said letter from Lancaster, Brown & Co., dated August 15th, 1873, and identifies the same as the original, and it is herewith annexed and marked "Exhibit E, C. N., Com'r, Nov. 27th, 1878."

The witness continues and says: No objection was ever made by Mr. Simonton to the correctness of the statements or accounts rendered to him by me or for my account.

The account, a copy of which is hereunto annexed, was sent to Mr. Simonton on the 23d day of February, 1875, and was never objected to by him.

Here the witness produces a paper and identifies it as such copy of the account sent to Mr. Simonton, and it is hereto annexed, marked "Exhibit F, Nov. 27, 1878, C. N., Com'r."

To the several cross-interrogatories addressed to him, the witness, Hiram Sibley, answers as follows:

92 1st. To the first cross-interrogatory he answers and says: In pursuance of my agreement and sale to Edward Matthews referred to in my answer to the third interrogatory, I subsequently executed an instrument in writing to Mr. Matthews, but I have no means of knowing whether the paper shown to me is a copy of the original paper referred to in this cross-interrogatory as "Exhibit A," but I presume that it is. HIRAM SIBLEY.

I hereby further certify that the foregoing deposition of Hiram Sibley was then and there reduced to writing by me in the presence of the deponent, said Sibley, and was by me carefully read over to

the said deponent, and that the same, after such reading, was subscribed by the said deponent in my presence, and sworn to before me on this 27th day of November, 1878.

CHARLES NETTLETON,
Commissioner.

93 And I further certify that on the same 27th day of November, A. D. 1878, at the same place and between the same hours, as named in the caption to the testimony of the witness Hiram Sibley, the said witness Robert A Lancaster, named in the annexed commission, personally came before me, and he being then of lawful age and sound mind, he was then by me first duly examined, cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, of his knowledge of the matters in controversy in the above and before mentioned cause, and being so sworn, the said Robert A. Lancaster testified as follows, viz:

1st. To the first interrogatory he answers and says:

My name is Robert A. Lancaster. I am forty-nine years of age. My residence is at Richmond, Virginia. My occupation is that of a stock and bond broker.

2d. In answer to the second interrogatory he answers and says:

My occupation during the years 1872, 1873, 1874 and 1875 was that of a banker and broker.

94 3d. In answer to the third interrogatory he answers and says:

I was a member of the firm of Lancaster, Brown & Co. I became a member of that firm about the year 1868. I ceased to be a member of that firm about the year 1875. After the first of January of that year the firm went into liquidation, and its interest in the adventure in the Western North Carolina Railroad bonds and stock on joint account with Hiram Sibley and R. F. Simonton, referred to in the pleadings in this suit, passed to one of the creditors of the firm of Lancaster, Brown & Co. I have since that time procured my discharge in bankruptcy, and have now no interest whatever in the subject matter of this suit.

4th. In answer to the fourth interrogatory he says:

Our firm was a party to the joint adventure in the Western North Carolina Railroad bonds and stock, with Hiram Sibley and R. F. Simonton of North Carolina.

95 5th. In answer to the fifth interrogatory, he says:

I have examined the agreements and instruments attached to the deposition of Hiram Sibley, in this suit, taken in pursuance of the annexed commission. I was present at the execution of, and saw the parties whose names appear to be subscribed thereto sign the papers, marked in the said deposition of Hiram Sibley as Exhibits "B," "C," and "E," and identify the same.

6th. To the 6th interrogatory he answers and says:

I was not present at the execution of Exhibit "A," but I believe

the signatures of Hiram Sibley and R. T. Wilson thereunto subscribed to be in the genuine handwriting of the said parties. The signatures of the firm of Lancaster, Brown & Co. to Exhibit "D" is in my handwriting, and was written by me. I was not present when Exhibit D was signed by R. F. Simonton, but I sent it to him by mail for his signature and received it back from him by mail, signed by him as it now appears.

96 The signature of said R. F. Simonton to said Exhibit D is in his own proper handwriting.

7th. To the 7th interrogatory he answers and says:

I know the handwriting of each and all of said parties whose names appear to be subscribed to the exhibits attached to the deposition of Hiram Sibley, in this suit, marked "Exhibits A, B, C, D, and E, November 27th, 1878, C. N., Com'r."

8th. To the 8th interrogatory he answers and says:

My opportunities for knowing the handwriting of the parties arose from my having frequently seen them write their names, and from having afterwards received letters from them.

I had correspondence with R. F. Simonton for about ten years.

9th. To the 9th interrogatory he answers and says:

Our firm of Lancaster, Brown & Co. held intimate business relations with both R. F. Simonton and Hiram Sibley. We joined Mr. Simonton in urging Mr. Sibley to furnish the money

97 for the joint adventure in the Western North Carolina Rail Road bonds and stock, which form the subject-matter of this suit, and in which before the purchase thereof we three parties proposed to take a joint interest.

Mr. Simonton first introduced the matter to us and urged us to join in it with him. He was the originator of the adventure, and at his request we presented the matter to Mr. Sibley and urged him to join Mr. Simonton and our firm in the adventure. Mr. Simonton procured the assignment to Mr. Sibley of the eight thousand one hundred and fifty-eight shares of the stock of the Western North Carolina Railroad Company, and expressed himself as fully satisfied with it. The negotiations with S. McDonald Tate for the transfer of this stock were made wholly by Mr. Simonton in behalf of himself, Mr. Sibley and Lancaster, Brown & Co. He assured both Mr. Sibley and myself both of the correctness and sufficiency of the assignment of the stock, and it was taken by Mr. Sibley for the joint account on the strength of Mr. Simonton's repre-

98 sentations. The firm of Lancaster, Brown & Co. had some correspondence, and I had several interviews with Mr. Simonton during the time the efforts were being made to sell the bonds and stock. He was kept fully informed by me of all negotiations that were pending and concluded from time to time as the same occurred, and he personally fully knew and approved of the same and of all that was done in the matter. He further authorized the firm of Lancaster, Brown & Co. to act as his agents in the

matter of the sale of the said bonds and stock, and as such agents of R. F. Simonton the said firm was in frequent communication with said Sibley upon the subject, and knew of and advised and consented to all negotiations and contracts that were made and entered into by said Sibley, and particularly to the agreement with R. T. Wilson, heretofore marked as Exhibit "A" in the deposition of Hiram Sibley in this suit, and knew that the payment of the sum of one hundred thousand dollars mentioned in said contract was and was to be a payment of one hundred thousand dollars of the
99 capital stock of the Southern Railway Security Company and not of that amount of money, and that said Southern Railway Security Company stock was received and taken by said Sibley for the joint account of said Sibley, Simonton and Lancaster, Brown & Co. as such stock and not as money, and fully consented thereto, both for ourselves and as the agents of R. F. Simonton.

10th. To the 10th interrogatory he answers and says:

My firm had several communications and correspondence with R. F. Simonton in respect to the joint adventure in Western North Carolina Railroad bonds and stock, both before and after the sale to Wilson. True and correct copies of the letters of my firm to said Simonton are hereto annexed, marked Exhibits Nos. 1, 2, 3, and 4, and the original letters received by my firm from him are hereto annexed, marked Exhibits 5, 6, 7, and 8.

11th. To the 11th interrogatory he answers and says:

The letter written by me, dated December 24th, 1874, and mailed to R. F. Simonton, Statesville, N. C., enclosed a statement
100 of the account of the parties interested in said joint adventure in the Western North Carolina Railroad bonds, showing the approximate amount of the indebtedness of Mr. Simonton and Mr. Sibley to Lancaster, Brown & Co. I have been unable to find any reply in writing to that particular letter.

12th. To the 12th interrogatory he answers and says:

I had a conversation with R. F. Simonton in reference to the state of accounts between the parties to the said adventure, and he made no objection to the account as it was so sent to him.

13th. To the 13th interrogatory he answers and says:

I have examined the account hereto attached purporting to be an account of dealings of the copartnership of R. F. Simonton, Hiram Sibley, and Lancaster, Brown & Co. with the last named firm. The said account is correct.

14th. To the 14th interrogatory he answers and says:

The several sums charged in the account, referred to in the 13th interrogatory as having been paid by Lancaster, Brown & Co. on account of the said copartnership, was so paid.

101 15th. To the 15th interrogatory he answers and says:

Mr. Sibley did not pay to Lancaster, Brown & Co. any portion of twelve hundred and ninety-two $\frac{46}{100}$ dollars shown to be due Lancaster, Brown & Co. from R. F. Simonton, but he did pay

to that firm his one-fourth part of the total sum of twenty-five hundred eighty-four $\frac{92}{100}$ dollars, which appears in that account to be the whole indebtedness to Lancaster, Brown & Co. from the parties interested in the adventure.

16th. To the 16th interrogatory he answers and says:

I do not think of anything further to state in answer to this interrogatory.

ROBERT A. LANCASTER.

I hereby further certify that the foregoing deposition of Robert A. Lancaster was then and there reduced to writing by me in the presence of the deponent, said Lancaster, and was by me carefully read over to said deponent, and that the same, after such reading, was subscribed by the said deponent in my presence, and sworn to before me on this 27th day of November, 1878.

CHARLES NETTLETON,
Commissioner.

102 And I further certify, that on the same 27th day of November, A. D. 1878, at the same place and between the same hours as named in the caption to the testimony of the witness Hiram Sibley, the said witness, John C. Mabin, named in the annexed commission, personally came before me, and he being then of lawful age and sound mind, he was then and there by me first duly examined, cautioned, and sworn to testify the truth, the whole truth of his knowledge of the matters in controversy in the above and before mentioned cause, and being so sworn, the said John C. Mabin testified as follows, viz:

1st. To the 1st interrogatory he answers and says: My name is John C. Mabin; age, thirty-eight years; I reside at Astoria, Long Island, in the State of New York; and am a broker by occupation, with my place of business at No. 30 Broad street, in the city of New York.

2d. To the second interrogatory he answers and says:

103 In the years 1872, 1873, and a portion of the year 1874, I was a banker and a member of the firm of Lancaster, Brown & Co.; since March, 1874, I have doing business in my own name as a broker.

3rd. To the third interrogatory he answers and says:

I was a member of the firm of Lancaster, Brown & Co.; I became a member of that firm January the 1st, 1871, and so continued till some time in the month of March, 1874, when the firm dissolved.

4th. To the fourth interrogatory he answers and says: It was.

5th. To the fifth interrogatory he answers and says:

I have examined the several exhibits attached to the deposition of Hiram Sibley hereunto annexed and taken in this cause, marked Exhibits A, B, C, and D and E. I was not present when Exhibit

"A" was signed, but I saw it in the office of my firm on the same day of its execution.

I was present when Exhibit "B" was signed. It was signed by Hiram Sibley, R. F. Simonton, and R. A. Lancaster, for
104 the firm of Lancaster, Brown & Co., in my presence.

I was present when Exhibit "C" was signed. It was signed by the same parties who signed Exhibit "B."

I was not present when Exhibit D was signed. I was not present when Exhibit "E" was signed, but it was signed by R. A. Lancaster, for the firm of Lancaster, Brown & Co., as appears by the handwriting of the signature.

6th. To the sixth interrogatory he says and answers:

I have examined these exhibits as stated in my last answer. Exhibit A is signed by Hiram Sibley, R. T. Wilson, and R. T. Wilson, as president of the East Tennessee, Virginia and Georgia Railroad Company, as appears by the handwriting of those signatures.

The signature to Exhibit D is in the handwriting of R. A. Lancaster; and the signatures are those of R. A. Lancaster and R. F. Simonton.

The body of the letter Exhibit "E" and the signature to it is in the handwriting of R. A. Lancaster.

105 7th. To the seventh interrogatory he answers and says:

I do not know the handwriting of all four of the parties to the Exhibits "A" to "E" inclusive.

8th. To the 8th interrogatory he answers and says:

I have seen them all write and sign their names.

9th. To the 9th interrogatory he answers and says:

My firm was jointly interested with the parties while attempts were made to sell the bonds. After the sale we had no relations except that of friends, and perhaps some other business not connected with this adventure.

10th. To the tenth interrogatory he answers and says:

My firm had frequent communications with R. F. Simonton previous to the sale to Wilson. Copies of the letters from my firm to R. F. Simonton have been annexed by R. A. Lancaster to his deposition taken in this cause, numbered 1 to 4 inclusive, and the original letters received by my firm from said Simonton
106 have also been annexed by Mr. Lancaster to his said deposition, marked Exhibits numbers 5 to 8 inclusive.

11th. To the 11th interrogatory he answers and says:

My firm did write a letter to R. F. Simonton in which was enclosed a statement of the parties interested in the said joint adventure. A copy of that letter is annexed to the deposition of R. A. Lancaster, in this cause, marked Exhibit No. 9, and a copy of that state ——— is annexed to said Lancaster's said deposition, marked Exhibit No. 10. I do not know whether any letter was received from Mr. Simonton in reply to the letter Exhibit No. 10.

12th. To the 12th interrogatory he answers and says:

I have never been present at any conversation with Mr. Simonton and other parties in which the account between the parties to the said joint adventure was the subject talked about.

13th. To the 13th interrogatory he answers and says:

I have examined that account. I recollect the main
107 items in that account. In the absence of the books of my firm I cannot state with positive certainty to some of the smaller items, but I believe it to be correct in all its parts. I know the main items are correct.

14th. To the 14th interrogatory he answers and says:

As to the principal amount charged for the purchase of the bonds, I know it is correct, and the money was paid by us. As to the smaller amounts, I believe they were paid by my firm, but in the absence of my firm's books I cannot state as to a definite certainty.

15th. To the 15th interrogatory he answers:

He paid my said firm his one-fourth part of the sum of twenty-five hundred and eighty-four $\frac{92}{100}$ dollars.

16th. To the 16th interrogatory he answers and says:

I do not think of anything further to state in answer to this interrogatory, unless it be the fact that I know that Mr. R. F. Simonton originated this joint adventure and urged Mr. Sibley and
108 the other parties to become interested in it with him, and he procured the assignment of the stock from Mr. Tate to Mr. Sibley to induce Mr. Sibley to buy the bonds, and stipulated in the negotiations that he should be included in the parties to the adventure.

JOHN C. MABEN.

I hereby further certify that the foregoing deposition of John C. Maben was then and there reduced to writing by me in the presence of the deponent, said Maben, and was by me carefully read over to the said deponent, and that the same, after such reading, was subscribed by the said deponent in my presence, and sworn to before me on this 27th day of November, 1878.

CHARLES NETTLETON,
Commissioner.

Commissioner's fees for taking the foregoing depositions are	$32 00
Cash paid, postage, &c	1 30
Paid by pl'tffs	$33 30

CHARLES NETTLETON,
Commissioner.

109 *Exhibit A.*

In the Circuit Court of the United States, Western District of North Carolina.

HENRY CLEWS, HIRAM SIBLEY, AND OTHERS
against
THE W. N. C. R. R. Co. (E. D.) AND OTHERS.

CITY, COUNTY, & STATE OF N. Y. } *ss.*

Know all men by these presents that I, Hiram Sibley, of the city of Rochester, State of N. Y., for and in consideration of the sum of two hundred and seventy thousand ($270,000.00) dollars, to me in hand paid by Ed. Mathews, of the city, county, and State of New York, the receipt whereof is hereby acknowledged, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over unto the said Ed. Mathews, all the right, title, interest, property, and possession which I now have, or which I may hereafter have, in and to a certain suit, above set forth by its title, now pending in the U. S. Circuit Court for the Western
110 District of North Carolina, Henry Clews and myself and others are parties plaintiff, and the W. N. C. R. Road Co. (E. D.), Tod R. Caldwell, and others are parties defendant, and also in the judgment or decree of foreclosure heretofore entered therein, and also in and to all money received, or to be received therein and thereunder, which may be or become due, owing, or coming to me, the said Hiram Sibley; also all right, title, ownership, property, and possession which I, the said Hiram Sibley, have or may have in and to, and in respect to any of the first mortgage bonds of the said W. N. C. R. R. Co. (E. D.) mentioned and described in the pleadings and decree in said suit, and also all the right, title, claim, interest, and demand which I, the said Hiram Sibley, may or can have under any agreements or contracts connected therewith now outstanding and unpaid, I, the said
111 Hiram Sibley, by these presents intending to convey, and actually conveying unto the said Ed. Mathews, all my right, title, interest, property, ownership, and claim, of every kind and nature soever, into any and all the mortgage bonds of the said W. N. C. R. R. Co. (E. D.), both endorsed and unindorsed, and also in and to any shares of the capital stock of said company, more especially all my right, title, interest, property, and claim in and to an assignment of a certificate of some 8,000 shares of the capital stock of said company, owned and held by various shareholders, and by them assigned to S. McD. Tate, and by the said Tate to me, the said Hiram Sibley, on or about the 12th day of April, 1872, subject to all proceedings had and contracts taken and entered into with reference to the collection of the said mortgage bonds,

and the foreclosure of the mortgage executed by the said R. R. Co. to support the same, and subject also to the operation of a contract heretofore made and entered into between me, the said
112 Hiram Sibley, and R. T. Wilson, pres't of the East Tennessee, Virginia and Georgia Railroad Co., bearing date the 7th day of Nov., 1872, since assigned by the said R. T. Wilson, pres't as aforesaid, to other parties, and now claimed to be owned and controlled by the N. C. R. R. Co., which contract provides, among other things, for a sale on or before the 17th day of Nov. next ensuing the date of these presents under certain specific conditions, which sale and conditions the said Ed. Mathews is to make and perform in the manner therein provided, if performance be tendered within that time by the said Wilson or his assigns. It is hereby distinctly understood, declared, stipulated, and agreed that all assignments, transfers, and sales herein, and hereby made and intended to be made, are made without warranty by or recourse to and upon me, the said Hiram Sibley.

It is hereby further distinctly understood, declared, stipu-
113 lated, and agreed that the payment of one hundred thousand dollars in the stock, at par, of the Southern Railway Security Company heretofore made to me, the said Hiram Sibley, specified and alluded to in the contract aforesaid, is to be retained by me, the said Hiram Sibley, in any event.

It is hereby further distinctly understood, stipulated, and agreed that the said Ed. Mathews is hereby substituted to any and all the rights of me, the said Hiram Sibley, and my responsibilities touching the mortgage bonds and suit aforesaid, and touching the contract aforesaid, and all contracts and proceedings relating thereto and connected with the foreclosure proceedings in said suit.

In witness whereof, I, the said Hiram Sibley, have hereunto set my hand and seal, this 27 day of October, 1874.

HIRAM SIBLEY. [SEAL.]

Signed, sealed, and delivered in presence of
CHAS. E. WHITEHEAD.
CHAS. C. JONES, JR.

114 STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.*

Be it remembered that on this, the thirteenth day of April, A. D. 1875, before me, Ed. F. Corey, Jr., a commissioner for the State of North Carolina, duly commissioned and dwelling in said city, personally appeared Chas. E. Whitehead, the subscribing witness to the foregoing instrument signed by Hiram Sibley, to me personally known, who, on oath, duly proves the execution thereof for the purposes therein expressed.

In witness whereof I have hereunto set my hand and official seal.

[SEAL.] EDWIN F. COREY, JR.,

Commissioner for the State of North Carolina in New York.

115 *Contract between R. T. Wilson and Hiram Sibley. Exhibit A.*

This articles of agreement witness, That whereas Richard T. Wilson, of the city, county, and State of New York, and Charles M. McGhee, of Knoxville, Tennessee, have heretofore purchased from Rufus G. McAden, of Charlotte, North Carolina, his title, interest, and claim in and to the Western North Carolina Railroad and the western division of the Western North Carolina Rail Road, and for the better understanding of that transaction reference is hereby made to the contract of purchase made and existing by and between the aforesaid parties.

And whereas Hiram Sibley, of the State of New York, is the holder of the first mortgage bonds of the Western North Carolina Rail Road Co., say in amount one million and fifty-seven thousand dollars, which carry the unpaid coupons, and also he is the holder of a certificate of the secretary of the Western North Carolina Rail Road Co. as to the ownership of eight thousand shares of
116 the stock of said company; and whereas the said Hiram Sibley has heretofore instituted suit in the United States Circuit Court of North Carolina for the purpose of foreclosing the mortgage lien made on the said property to secure the payment of the bonds held by the said Sibley, which judicial proceeding are now pending; and whereas it is contemplated, after the foreclosure, sale, and purchase of the Western North Carolina Rail Road, to consolidate it with other roads by which a continuous line will be had from Salisbury, North Carolina, via Asheville to Morristown, in the State of Tennessee, which when completed will, it is believed, become a valuable feeder to the East Tennessee, Virginia, and Georgia Rail Road Co., and in consideration of the advantage thus to be derived the said East Tennessee, Virginia, and Georgia Rail Road Co., a corporation created and existing by virtue
117 of the laws of the States of Tennessee and Georgia, through its president and the aforesaid Hiram Sibley and Richard T. Wilson, severally agree with each other in manner following, to wit:

For purposes of convenience, the said Hiram Sibley is herein designated as the party of the first part, and the said Richard T. Wilson as the party of the second part, and the said East Tennessee, Virginia and Georgia Railroad Co. as the party of the third part:

1st. The party of the first part has this day sold to the party of the second part the aforesaid bonds on and the certifiate as to the ownership of the eight thousand shares of stock in the Western North Carolina Railroad Co. for the sum of three hundred and seventy thousand dollars, on which a payment of one hun-

118 dred thousand dollars has been made, the receipt of which is hereby acknowledged.

2d. The party of the second part is to be subrogated, if at any time he shall so elect, to the judicial position of the party of the first part, in the suit now pending, for the purpose of foreclosing the mortgage on the said Western North Carolina Railroad, and the party of the second part is to conduct the legal proceedings with reasonable diligence, and is to pay the legal expenses, including the attorney fees of the party of the first part, as per his contract with Ward, Jones and Whitehead, the attorneys.

3. The party to the second part expressly undertakes, covenants and agrees to, and with the party of the first part, that he will be present at the sale under foreclosure as aforesaid, and that at said sale he will become purchaser thereof, or in the alternative,
119 should others compete at the sale, will bid for the premises such an amount as will realize to the party of the first part, upon the securities sold by him and to which this agreement relates, a net sum equal to the aforesaid amount of two hundred and seventy thousand dollars, and immediately after the completion of said title in the party of the second part, and when possession is obtained by him of the said Western North Carolina Railroad franchises and property, then interest is to begin at the rate of three and one-half per cent. per annum upon said deferred payment of two hundred and seventy thousand dollars.

4th. After the title to the Western North Carolina Railroad is procured by a foreclosure and sale as aforesaid, it is contemplated to consolidate that road with others and issue bonds, principal and interest payable in gold, at the rate of twenty thousand dol-
120 lars per mile if the rate of interest should be fixed at six per cent. per annum, or at the rate of eighteen thousand dollars per mile if the rate of interest shall be fixed at seven per cent per annum, and secure the principal and interest of said bonds so issued by a first mortgage lien on the consolidated line of road.

5th. It is intended to sell the bonds to be issued as aforesaid and apply, as the same are sold, sufficient of their proceeds to the payment and discharge of the deferred payment and interest thereon which will be owing to the party of the first part; and when the aforesaid Western North Carolina Railroad is sold and purchased, as now contemplated by the party of the second part, the purchase shall be made with the understanding and upon the condition that the entire property, franchises, and income shall
121 be held in trust by the party of the second part, first, to secure the deferred payment owing to the party of the first part, and interest thereon at the rate previously stated; and secondly, after such payment, to secure the aforesaid East Tennessee,

Virginia and Georgia Railroad Co., for the loan of two hundred thousand dollars made to the party of the second part, for reason stated herein as to one hundred thousand dollars, and for like reasons as stated in the contract made by the party of the second part, and Charles M. McGee and the said East Tennessee, Virginia and Georgia Railroad Co., and the aforesaid Rufus Y. McAden, in a contract previously herein referred to. And it is further agreed that the party of the second part shall execute at the proper time such legal instruments as may be in his power to do by reason of the title which may at the time rest in him, in order to
122 fully carry out and perfect this provision of this agreement; but it is not intended by this agreement to make the party of the second part individually liable for the deferred payment owing to the party of the first part for balance of the purchase money on account of the purchase of the aforesaid bonds, it being understood and agreed that the party of the first part is to look alone to the property to be purchased by the party of the second part and held in trust as aforesaid as the means by which the payment of this debt is secured, and his is also the understanding with the party of the third part respecting the loan of two hundred thousand dollars previously referred to.

6th. In case the contemplated consolidation of roads hereinbefore mentioned and the issue and sale of bonds are not carried out within two years from the date hereof, then, and in that
123 case, the deferred payment of two hundred and seventy thousand dollars, and interest thereon, or any part of the same, then remaining unpaid shall become due and payable; also the two hundred thousand dollars borrowed from the East Tennessee, Virginia and Georgia Railroad Co., with the interest thereon at the rate of seven per cent. per an'm, shall also become due, and the property, franchises, &c., to be purchased and held in trust by the party of the second part, shall be sold, upon reasonable notice to the party of the first part, by advertising, and the proceeds applied, so far as the same may suffice or be necessary to the discharge of the trust, as herein provided for.

7th. The securities of the Western North Carolina Railroad Co. sold by the party of the first part in amount and kind as
124 previously stated, are *are* deposited in the hands of Ward, Jones & Whitehead, where they are to remain, subject, however, to the order and control of the party of the second part, so far as may become necessary for the purpose of carrying out the object and purposes of this agreement.

8th. Inasmuch as the action of the party of the third part in this matter pertains only to the parties of the second and third parts, and is probably not binding upon the party of the third part until

the same is approved by its board of directors, it is agreed by the parties of the first and second parts that the approval or disapproval of the party of the third part shall not affect the validity of this agreement as between them, but the same shall be binding on the parties of the first and second parts when signed.

9th. It is hereby agreed that in case the party of the
125 second part shall so elect, he shall have the privilege of substituting the Southern Railway Security Company, a corporation existing by virtue of the laws of the State of Pennsylvania, in his stead for all the purposes of this agreement, as fully and to all intents and purposes as if the said Southern Railway Security Co. had been the original signer of this agreement, and at any time during the pendency of the same the written assent of the said Southern Railway Security Co. to be thus substituted, and due notice given thereof by the party of the second part to the other parties to this agreement, shall fully accomplish the substitution herein intended to be provided for, whereupon the party of the second part shall be fully exonerated and discharged as a party to this agreement.

10th. If at any time during the pendency of this agreement the said Southern Railway Security Co. shall elect to give its
126 obligation for the amount of the deferred payment which may then be owing to the party of the first part, the party of the first part agrees to accept the same in lieu of the lien herein provided for on the aforesaid Western North Carolina Railroad; but this provision does not impair the obligation to pay whenever the bonds to be issued under this agreement shall be sold as proposed.

11th. The party of the second part may nominate a receiver or commissioner under the judicial proceedings for a foreclosure, and is to have possession of and operate said road if purchased by him, so soon as possession is legally obtained.

In witness whereof the parties affix their respective signatures.

New York, November 7th, 1872.

HIRAM SIBLEY.
R. T. WILSON.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY,
By R. T. WILSON, *President.*

Witness—C. H. BUSHER.

127 *Exhibit No.* 10.

R. F. SIMONTON,

To obligation to H. Sibley for ½ interest on W. N. C. bonds and stock, due March 14, '73		$135,633
Interest March 14, '73, to Oct. 31, '74, 19 mos. and 7 days @ 7 per cent		15,481
		$151,114
By ½ pro. sale	$135,000	
" ½ div. on $150,000 So. R'y Sec'y stock	1,750	136,750
To bal. due H. Sibley, Oct. 31, '74		$14,364 00
To legal fees and expenses, &c., to Oct. 31, '74	$5,584 92	
Less paid by Matthews	3,000	
	$2,584 92	
½ of Do. due L. B. & Co., Oct. 31, '74		1,292 46
Bal. due Oct. 31, '74, by R. F. Simonton		$15,656 46

This memo. will probably be varied somewhat when Mr. Sibley's acc. comes in.

128 *Exhibit B.—Contract between Hiram Sibley, R. F. Simonton, and Lancaster, Brown & Co.*

Banking House of

LANCASTER, BROWN & Co.,

No. 1. Exchange Court, (Exchange Place, near Broadway,)

{Internal Revenue Stamp.} NEW YORK, *June 19th*, 1872.

This agreement between Hiram Sibley, of Rochester, R. F. Simonton, of North Carolina, and Lancaster, Brown & Co., of New York, *witnesseth*, That the said Sibley agrees to sell to the said Simonton one-half interest in all his right and title to one million and fifty-seven thousand dollars of the first mortgage bonds of the Western North Carolina Railroad Company, now held by him, (five hundred thousand dollars of said bonds being signed by only one trustee,) and now in hands of Lancaster, Brown & Co. for safe keeping, and eight thousand one hundred

and fifty-eight shares of stock in said company, for the sum of one hundred and thirty-five thousand six hundred and thirty-three dollars, payable on 14th day of March, 1873, and the said
129 Simonton agrees to buy the said interest and to pay as aforesaid, and the said Sibley also agrees to sell to the said Lancaster, Brown & Co. one-fourth of all his right and title to the said bonds and stock for the sum of sixty-seven thousand eight hundred and seventeen dollars, payable on 14th March, 1873, and the said Lancaster, Brown & Co. agree to buy the same and to pay as aforesaid. It is expressly understood that the aforesaid bonds and stock sold each party are to be considered as held by Hiram Sibley as collateral security for the prompt payment of the said sums of money, and the whole amount of bonds and stock shall be held together, and that neither party to this contract shall sell or in any way dispose of the whole or any part of his interest in the same without the consent of all the other parties, but Hiram Sibley
130 shall have the privilege of selling the whole amount of both bonds and stock at his discretion, at any time, and apply the proceeds to the payment of said sums due to him, allowing a rebate at the rate of 7 per cent. per annum, if the payments shall be thus received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end may employ counsel, the charge for which shall be borne by the parties in interest, in proportion to the amount of bonds and stock held by each, and whatever the proceeds of said foreclosure may be, or if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and
131 stock are now held, but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums respectively.

HIRAM SIBLEY.
R. F. SIMONTON.
LANCASTER, BROWN & CO.

{Int. Rev. Stamp. 5 cents.}

132 *Exhibit C.—Agreement as to profits, &c.*

NEW YORK, *June 20th*, 1872.

Mr. Hiram Sibley having this day sold to R. F. Simonton one-half of his interest in 1,057,000 1st mortgage bonds of the Western North Carolina R. R. Co. and eight thousand one hundred and fifty-eight shares of the stock of said Co., and to Lancaster, Brown & Co. one-fourth interest in said bonds and stock, he himself holding the remaining one-fourth interest, it is mutually agreed between all the parties that from any profits arising from the sale, foreclosure, or any other disposition of said bonds and stock, $25,103.75

shall be first set apart to be divided in three equal parts, Hiram Sibley, R. F. Simonton and Lancaster, Brown & Co. each to have one-third; from any profits remaining there shall be first paid to Lancaster, Brown & Co. the commission by them for sale of
133 bonds and tax amounting to $1,348.20, and to W. N. C. R. Co. $881.27 due to said Co., and any balance remaining shall be divided as follows:

Hiram Sibley one-fourth.

R. F. Simonton one-half.

Lancaster, Brown & Co. one-fourth.

In case of loss in this adventure the amount due to L. B. & Co. of $1,348.20 and to W. N. C. R. Co. of $881.27 shall be paid by each of the parties in proportion to their interest, and in the same proportion any deficiency that may exist in the proceeds necessary to return to the said Hiram Sibley the sum of two hundred and seventy-one thousand two hundred sixty-six dollars.

{Int. Rev. Stamp. 5 cts.}

HIRAM SIBLEY.
R. F. SIMONTON.
LANCASTER, BROWN & CO.

134 *Exhibit D.—Authority to Hiram Sibley to sell bonds, &c.*

NEW YORK, *Oct. 3rd*, 1874.

Whereas we, the undersigned, in connection with Hiram Sibley, Esq., became the purchaser of $1,057.000 of the first mortgage bonds of the Western N. C. Railroad Company; and whereas the said Sibley furnished nearly the whole amount of money paid for said bonds, and has not required us to pay him for our proportion of said cost, although the delay in realizing on said bonds has been much greater than was expected; and whereas, appreciating his liberality and being anxious that he should recover his money thus invested in the shortest time possible, we have heretofore left to him the management of the adventure, we hereby authorize and request him to continue to direct the foreclosure proceedings against the said R. R. Co., or to take such other action by
135 sale of bonds or otherwise as may in his judgment appear for the best interest of all concerned, thereby assuring him that whatever course he may deem best will be satisfactory to us.

LANCASTER, BROWN & CO.
R. F. SIMONTON.

136 *Exhibit E.*

NEW YORK, *Aug't 15th*, 1873.

H. F. ATKINSON, ESQ.,
Rochester, N. Y.

Dear Sir:

In y'r letter of 11th inst. you asked our opinion as to selling

now stock of the Southern Security Co. We do not think it at all advisable to offer the stock just now. The management of the Co. has been greatly improved. At first they made the mistake of buying the control of too many roads, and once or twice have been a little pressed for money. But they made a change of policy and a change of officers, and to put Co. interest easy in money they have recently offered the stockholders bonds of the Co. (7 per cent.) at par, taking in part payment 40 per cent. of the stock of the Co. at par. They tell us that one of the circulars was sent to Mr. Sibley, at Rochester. We learn that the bonds will be all taken. Yesterday was day of the option, and
137 most of the stockholders have subscribed, the sec't'y informed us, and the directors, he says, will take the balance. We asked him if the option could be left open awhile for Mr. Sibley, and he said it could be if Mr. S. had not been informed. Mr. Sibley wrote in his letter to the writer: "My son and his wife will return next month to New York." His letter was dated July 27th. Can you tell us when they are expected here?

Yours truly,

LANCASTER, BROWN & CO.

138 *Exhibit F.*

ROCHESTER, *Feb'y 23rd*, 1873.

R. F. SIMONTON, ESQ.,

To HIRAM SIBLEY, Dr.

1873.			
March 14.	To ½ int. in stocks and bonds in Western North Carolina R. R. adventure, 2) 271,266		$135,633 00
1874.			
Oct. 31.	Int. M'ch 14, '73, to date— 19 mos. 17 days, 7 per ct.		15,481 00
			$151,114 00

Credit.

By dividend Southern Security stock, and int. same to M'ch 14, '73.....	$3,549 00	
Deduct expenses of H. Sibley to New York, and int. to M'ch 14, '73.....	208 20	
		$3,340 80

1874.

Oct. 31.	Int. M'ch 14, '73, to date, Oct. 31, '74—19 mos. 17 days.....	381 32	
		2) 3,722 12	
	½ of above.....	$1,861 06	
	½ proceeds of sale, 2) 270,000.	135,000 00	
			$136,861 06
			$14,252 94

Copy of account sent Simonton Feb'y 23, 1875.

139 *Exhibit No.* 1.

AUGUST 10TH, 1872.

Col. R. F. SIMONTON,
Statesville, N. C.

DEAR SIR: Yours of the 5th rec'd. As we understand it, there is no stock now standing in the name of Mr. Sibley. He simply holds a certificate from the secretary of the Co. that there are 8,158 shs. of stock standing in *Col. Tate's* name, with Col. Tate's power of attorney on the back. As it now stands Tate can vote the stock, but if he thinks that the stock had better be transferred to Mr. Sibley, and he give p. of atty., we will send it to you. When do the transfer books close? Communicate with Tate, and find out what he thinks best, and write us at once, and your wishes shall be complied with. We wrote Col. Tate a short while since regarding the W. N. C. R., and supposed that you had learned from him how things stood. The contract has been drawn
140 agreable to the offer of Cass, of which we are advised, and is now only awaiting signatures. In the meantime, the papers in the matter of foreclosure have been prepared, and Col. Whitehead is now in Raleigh to file them.

Yours truly,
(Signed) LANCASTER, BROWN & CO.

141 *Exhibit No.* 2.

NEW YORK, *Oct. 5th*, 1874.

Col. R. F. SIMONTON,
Statesville, N. C.

DEAR SIR: Mr. Sibley has been for several days conferring with Messrs. McAden and Tate concerning the W. N. C. R. R. complications. He has reminded me that he expressed a wish many months ago to have from you and ourselves the authority to direct

the management of our joint adventure in the bonds of the said road. As he has furnished almost the entire amount of money so invested, and has not called on us to reimburse him, I think that the management should be left to his discretion, and that we should give him our written consent thus to represent us. To this end I have written and signed the enclosed paper, which is satisfactory to Mr. Sibley, tho' he would prefer to have us pay to him the amount he has paid for us, and share with him the trouble
142 and responsibility of directing the management. He has also mentioned to me the receipt of the letter you wrote him on the subject of the rate of interest he is to charge. I don't know what he will say to you in reply, but I am sure that, considering his forbearance in the past, we need not fear any unreasonable exactions in the future. If you approve, as I am sure you will, please sign and return the enclosed paper.

Yours truly,

(Signed) LANCASTER, BROWN & CO.

143 *Exhibit No. 3.—Petition from Lancaster to R. F. Simonton.*

NEW YORK, *Dec. 17th*, 1875.

R. F. SIMONTON, ESQ.,
Statesville, N. C.

DEAR SIR: Mr. Sibley is here and seems very much annoyed at not hearing from you in regard to your indebtedness to him growing out of that Western North Carolina R. R. bond transaction. He says he is not inclined to give you trouble, and is willing to make a liberal settlement, but a settlement he must insist on, and hopes you will not force him to bring suit against you. He requests that you will come on to see him here in regard to the matter, and says you must not think he would take advantage of your presence here to sue you in New York for the balance due him. He agrees positively not to take any such advantage, but says, unless you will make a settlement with him, he will be compelled, though reluctantly, to sue you in North Carolina.

Yours truly,

R. A. LANCASTER.

144 *Exhibit No. 3.—Simonton's Reply.*

STATESVILLE, N. C., *Jan'y 10th*, 1876.

R. A. LANCASTER, N. Y.

Your letter, with Mr. Sibley's request, rec'd. I have been an invalid all last year, and Col. Tate has all my papers, and promised me to go to New York, see you and Mr. Sibley, and make a settlement. He has not done so. I have forwarded your letter to him. I hope he will attend to this case. There is no use of a suit; all can be settled without.

Truly, R. F. SIMONTON.

145 *Exhibit No. 4.—Letter from Lancaster, Brown & Co. to R. F. Simonton.*

Dec. 27th, 1872.

COL. R. F. SIMONTON,
Statesville, N. C.

DEAR SIR: Your favor of the 12th instant has been unintentionally overlooked. The W. N. C. R. R. bonds have been sold to the Security Co., and they have paid Mr. Sibley $100,000 in security stock on account. The other payments to be made from the proceeds of new bonds after the foreclosure of the road; the whole matter, therefore, is now in their hands, and Mr. Sibley is only interested in having the road promptly sold, and we think the Security Co. is in the same direction. We were informed a few days ago that an injunction had been asked for, but we do not know from what quarter the opposition comes.

Yours truly,

(Signed) LANCASTER, BROWN & Co.

146 *Exhibit No. 5.—Letter from Simonton to L., B. & Co.*

BANK OF STATESVILLE,
STATESVILLE, N. C., *Agt. 7th*, 1872.

Messrs. LANCASTER, BROWN & Co.,
New York:

Please send me proxy to represent the stock in the W. N. C. R. R. Co'y at general meeting on 27th. Mr. H. Sibley must sign it. What has been done in the Western N. C. R. R. sale? Keep me posted.

Truly,

R. F. SIMONTON.

Exhibit No. 6.

STATESVILLE, N. C., *Sept. 17th*, 1872.

Messrs. LANCASTER, BROWN & Co.,
New York:

Yours of 2nd to hand. We hold the A., T., and O. R. R. bonds as col. in the bank. No sale has been made. Will report. I am very anxious to learn that the papers in the W. N. C. R. R. have been signed. Will pay you a visit in Oct.

Truly,

R. F. SIMONTON.

147 *Exhibit No. 7.—Letter from Simonton to Lancaster, B. & Co.*

STATESVILLE, N. C., *Apl. 25th*, 1874.

Messrs. LANCASTER, BROWN & Co.,
New York:

GENTS: The suit, Sibley vs. W. N. C. R. R., has been withdrawn

by the gov. on the appeal bond. Sale has been ordered, and will certainly take place. The private stockholders (or part of them) may enjoin consolidation, and prevent N. C. R. R. from buying, but that has nothing to do with us or the sale. We care not who buys. The sale completes our contract. After the sale I want Mr. Sibley and us to sue the securities on the appeal bond for large damages. Consult the att'ys in N. Y. if we cannot recover damages on said bond. I will get all the information desired in this State, and report when requested.

The trade with Wilson was a bad one, but we must stand to it, as Mr. Sibley made it in good faith. I will be to see you
148 before sale if necessary, but don't think it will *be*. There is money to be made by purchasing the road. You can say to Mathews and others: Can you get the B. and O. R. R. to buy? Write me fully.

SIMONTON.

There is more money in the purchase of the road than you think, as all doubt of the validity of the bonds has vanished.

149 *Exhibit No. 8.—Letter from Simonton to R. A. Lancaster & Co.*

STATESVILLE, N. C., 10*th Jan'y*, 1876.

R. A. LANCASTER & CO., *N. Y.*

Your letter with Mr. Sibley's request rec'd. I have been an invalid all last year, and Col. Tate has all my papers, and promised me to go to N. Y., see you and Mr. Sibley, and make a settlement. He has not done so. I have forwarded your letter to him. I hope he will attend to this case. There is no use of a suit. All can be settled without.

Truly,

R. F. SIMONTON.

150 *Exhibit No. 9.—Letter from R. A. L. to R. F. Simonton.*

N. Y., *Dec. 24th*, 1874.

COL. R. F. SIMONTON, ESQ.,
Statesville, N. C.

Dear Sir: Your favor of the 22nd inst. to hand this morning. I regret that the mistake should have been made in writing Statesville for Charlotte. Not seeing you at the depot I supposed that you were absent from home, and that it would be useless to make an effort to see you on my return. Though I would have notified you had I supposed I would have to spend the whole day in Charlotte, as I did on my return from Alabama. Mr. Sibley sold out to Mr. Mathews for $270,000, but in order to induce him to purchase had to lend him $200,000.

We enclose a statement showing figures, as near as we can give them, of your indebtedness to Mr. Sibley and to ourselves, grow-

ing out of that transaction. To Mr. Sibley you will owe $14,364, and to us $1,292.46. And Mr. Sibley will have to transfer
151 to you upon the payment of the aggregate amount, say $15,656.46, $75,000 of Southern Railway Security stock. That amount of that stock cannot be sold now to realize as much as $15,000, but it is said that it is intrinsically worth 25 cents on the dollar.

We have written to Mr. Sibley to send us his account against you, which I will send you as soon as received, but I don't think it will vary materially from that which I enclose.

Yours truly,

(Signed) R. A. LANCASTER.

And the following notice of plaintiff of filing interrogatories and exceptions to plaintiff's evidence are filed in said cause, which notice and exceptions are in words and figures, as follows, viz:

152 *Notice of filing Interrogatories by Plaintiffs.*

Circuit Court of United States, Western District of North Carolina.
In Equity.

HIRAM SIBLEY AND PAUL P. WINSTON, assignee of Lancaster, Brown & Co., complainants,
against
ROXANA SIMONTON, EXECUTRIX OF ROBERT F. Simonton, dec'd, defendant.

To Luke Blackmer, Esq., att'y for Roxana Simonton, ex'tr'x:

Please take notice that the complainants above named have filed interrogatories in the office of Jno. W. Payne, clerk of the said court, in the above entitled cause, to be propounded to Hiram Sibley, Robert A. Lancaster, John C. Maben, James O. Proudfit, and Howard Sanders, as witnesses on behalf of the complainants, and that the complainants will move the court, ten days after the service of this notice on you for commissions to issue for examination of said witnesses, within which time you may file cross-interrogatories as you may be advised.

JONES & JOHNSTON,
Sol's for Comp'ts.

153 *Exceptions to Plaintiff's Evidence.*

HIRAM SIBLEY AND OTHERS
vs.
ROXANA SIMONTON, EX'R'X OF R. F. Simonton.

For account before J. W. Payne, clerk U. S. courts at Greensboro.

Defendant excepts to the evidence of plaintiffs filed in this case in the following particulars:

First. The letter purporting to be from R. A. Lancaster to R. F. Simonton, dated Dec. 17th, 1875, and the answer thereto from R. F. Simonton to R. A. Lancaster, dated January 6th, 1876, are excepted to.

Second. The account of Lancaster, Brown & Co. is excepted to, not as erroneously charged against the Western North Carolina Railroad Adventure Co., but because no part of it is justly or legally chargeable against the estate of R. F. Simonton, dec'd, as Hiram Sibley of said Adventure Company had ample means belonging to said company to have paid this and all other indebtedness of said company.

Third. The account of Hiram Sibley against R. F. Simonton in the Western North Carolina Railroad Adventure Company
154 is excepted to in the following particulars:

(1st.) In that he, the said Sibley, charges that he sold and delivered a large amount of stock in the Western North Carolina Railroad Company, which stock defendant denies that said Sibley either owned, sold or delivered as a member of the Adventure Company as aforesaid.

(2nd.) In that he, the said Sibley, has failed in said account to charge himself with one hundred thousand dollars and interest thereon at 7 per cent. from Nov. 2, 1872, being the cash value of stock received by him from Edward Matthews in the Southern Security Company.

BLACKMER & HENDERSON &
J. M. McCORKLE,
Sol'rs for Def't.

The following depositions taken by Jno. W. Payne, commissioner, in said cause, and exhibits thereto attached, which said depositions and exhibits are in words and figures as follows, viz:

155 *Testimony taken by Payne, Com'r.*

In the Circuit Court of United States, Western District of North Carolina.

HIRAM SIBLEY ET AL.
against
MRS. ROXANNA SIMONTON, EXECUTRIX of R. F. Simonton. } In Equity.

In obedience to an order to me heretofore directed in above case, I notified the plaintiff and defendant that I should proceed at the court-house in Salisbury, in said district, on the 18th day of March, 1879, at 10 o'clock A. M., to take and record testimony to be read

in this cause, when and where I was attended by the counsel of plaintiff and defendant, and all informalities being waived, I proceeded to record the testimony herewith filed, to wit, that of R. Y. McAden, S. McD. Tate, G. P. Erwin, and exhibits (letters) 1, 2, 3, 4, 5 and 6.

Respectfully submitted,

JNO. W. PAYNE,
Com'r.

156 *Depositions of R. Y. McAden.*

R. Y. McAden, a witness for the respondents, deposeth and saith:

Int. 1. What is your occupation, and where do you reside?

Ans. I am the president of the First National Bank of Charlotte, N. C., and have been since the year 1867, and I reside in the city of Charlotte.

Int. 2. Do you know Hiram Sibley, R. T. Wilson, and R. A. Lancaster, and did you know the late Robert F. Simonton?

Ans. Yes.

Int. 3. Did you, at any time, have any business dealings with said parties, or any of them, in connection with the Western N. C. Railroad Company, or the Southern Railway Security Company; if so, state what such dealings were?

Ans. Yes; I purchased from James W. Wilson, of the firm of Wilson & Malone, a large amount of first mortgage bonds, debts, and judgments against the Western N. C. Railroad, and, during the years 1871 or 1872, I sold the same to the Virginia, East
157 Tennessee and Georgia Railroad Company, through its president, R. T. Wilson, of New York. Hiram Sibley came into possession of a large amount of the first mortgage bonds of the Western N. C. R. R.—about $1,057,000 worth. By reason of our mutual interest in said road, Mr. Sibley and myself became acquainted, in the city of New York, some time in the year 1872. Mr. Wilson, as president of the Virginia, East Tennessee and Georgia R. R. Co., having purchased my interest in the bonds and debts against the Western N. C. R. R. Co., was negotiating for the purchase of the interest of Mr. Sibley in said Western N. C. R. R. Co. Sibley, Wilson, and myself were thrown together in consequence of such negotiation, which was pending for several days, in New York, before a final agreement was concluded. Sibley insisting that Wilson should carry out an agreement, which Sibley alleged that one General Cass had made with him for the purchase of Sib-
158 ley's interest in the Western N. C. R. R. during Wilson's absence in Europe, which agreement was that R. T. Wilson, for his company, should purchase all of Sibley's interest in and claims against the Western N. C. R. R. Co. for the sum of three hundred and seventy thousand dollars, one hundred thousand

dollars of which was to be paid in cash, and the balance in deferred payments. This contract Wilson repudiated, alleging that he had never consented to it.

After Sibley and Wilson meeting together for several days, Wilson proposed that he would carry out that contract provided Sibley would receive one hundred thousand dollars in stock in the Southern Railway Security Company at par as a cash payment. This Sibley declined to do, and negotiations seemed to be at an end. The next day, or the day after, Mr. Sibley, myself, and Mr. Wilson met in Mr. Wilson's office again and negotiations
159 were renewed, Mr. Sibley remarking to Mr. Wilson that I have made inquiry in the city and find that your stock is not worth par, as you represented, but that it is worth ninety-seven and a half cents (97½ cts.); that I think more of it than you seem to think of it, as you seem to be anxious to get rid of it, and I will take it; that you are not managing your company right, and I will get in with you and show you how to manage it, and we will make a good thing out of it." With that understanding Mr. Sibley, Mr. Wilson, and myself went round to Mr. Jessup's office, who was a director in the Southern Railway Security Co., for the purpose of reducing the contract to writing; that there a misunderstanding arose in reference to a question of interest which Sibley alleged had accrued under the last contract, and the
160 parties separated without any agreement. Sibley and myself went together to the St. Nicholas hotel, and after talking awhile with me he agreed to waive the difference as to interest. It was then night, and Sibley requested me to telegraph to Jessup and Wilson that he was willing to accede to their terms, and to reduce the contract to writing the next day. I left New York next morning. I saw the contract afterwards which was signed that day, which is filed with the papers in this suit, dated Nov. 7, 1872, and which both Sibley and Wilson acknowledged to me that they had signed and executed.

Cross-examined:

Int. 1. Did you ever own, buy, or sell any stock of the Southern Railway Security Company?

Ans. I never did.

Int. 2. Do you know whether or not this stock was ever quoted on the stock-board in the city of New York?

Ans. I do not.

Int. 3. Do you know what its actual value was at the time of the Wilson trade?

161 Ans. I do not, except from the common understanding that it was then regarded as good stock.

Int. 4. What did the capital stock of the company consist of?

Ans. I understood the capital stock was $5,000,000 of cash paid

in, which cash had been invested in securities of several of the Southern railway companies.

Int. 5. Did not the solvency of the company depend upon the solvency of those railroads?

Ans. It did.

Int. 6. What is the stock of the S. R. S. Co. worth now?

Ans. Very little, if anything.

Int. 7. When did the stock of the Co become worthless?

Ans. I don't know.

Int. 8. State what the occupation of R. F. Simonton was, where he lived, and what his financial reputation was in 1872?

Ans. He lived in Statesville, N. C.; was president of the Bank of Statesville, and his financial reputation was good.

R. Y. McADEN,

162 Sworn to and subscribed before me March 18th, 1879.

JNO. W. PAYNE,
Commissioner.

Samuel McD. Tate, being duly sworn, deposeth and saith:

(Witness for respondent.)

Int. 1. Do you know Hiram Sibley; and if so, how long have you known him, and did you ever have any business transactions with him?

Ans. About Feb'y, 1872, as president of the W. N. C. R. R. Co., I went to New York for the purpose of making arrangements to secure or settle some debts against said R. R. incurred by my predecessor, Dr. Mott, which debts were in the shape of notes, which had been renewed and indorsed by myself. Mr. R. F. Simonton accompanied me, and introduced me to Lancaster, Brown & Co., who represented that they had a fund in their hands belonging to Mr. Sibley, which they would lend upon the same securities,

163 sufficient to take up these outstanding notes against the W. N. C. R. R. Co. There were two notes of about $120,000 each, one payable to N. Y. Guarantee and Indemnity Co., and the other to the N. Y. Warehouse and Security Co. They furnished me the funds to take up the said debts on the W. N. C. R. R. Co. I filed a new note with Lancaster, Brown & Co. for the amount advanced, and left as collaterals the mortgage bonds of the W. N. C. R. R. Co., amounting to about $1,057,000 (signed and unsigned), being the same bonds which had been pledged to secure the original loan. Some time after this I met Mr. Sibley at Lancaster, Brown & Company's, and was informed by him that he was interested in this loan. I have met Mr. Sibley frequently since, but not lately.

Int. 2. Did you ever have any conversations with Hiram Sibley in regard to the value of the stock of the Southern Security Railway Company in November, 1872, or at any time thereafter, or do you know what that stock was worth about that time?

164 Ans. I think I have heard Mr. Sibley speak of the transaction of the sale by R. T. Wilson to Mr. Sibley of the $100,000 worth of stock of the Southern R. S. Co., and I think I have heard Mr. Simonton and Mr. Lancaster speak of the same transaction. My understanding was, the stock was not such as was on the "call" of the stock list. It was held by a few wealthy persons, and they "placed" it privately. It was a new company, and the stock was understood to represent a cash capital. I am pretty certain that I heard either Sibley, Lancaster, or Simonton speak of this stock as being worth par about the time of the sale from Wilson to Sibley. I don't recollect whether Mr. Sibley ever told me what he regarded the value of the said stock to be at the time of the Wilson sale, but the purport of his conversation with me left the impression upon my mind that Sibley was satisfied with the trade.

Int. 3. Did you ever hear Mr. Lancaster speak of the
165 value of this stock about the time of the Wilson sale?

(Question objected to.)

Ans. I heard Mr. Lancaster speak of this stock as equivalent to $100,000 cash payment to Mr. Sibley.

(Answer objected to.)

Cross-examined:

Cross-Int. 1. What became of the collaterals which you put up to secure the loan you have spoken of?

Ans. They were sold at public auction to discharge the debt. The mortgage to secure the bonds of the W. N. C. R. R. Co., heretofore spoken of, was foreclosed by a decree of the Circuit Court of the U. S. for the Western District of N. C., under which decree the road was sold and passed into the hands of the present owners.

SAM'L McD. TATE.

Sworn and subscribed before me March 18th, 1879.

JNO. W. PAYNE,
Commissioner.

166 George P. Erwin, a witness for the respondent, being duly sworn, deposeth and saith:

Int. 1. What is your occupation, and where do you reside?

Ans. I reside in Morganton, N. C., and am the secretary and treasurer of the Western N. C. Railroad Company.

Int. 2. Do the books of said company show whether there was any transfer of any of the stock of said corporation to Hiram Sibley at any time?

Ans. The books do not show that there ever was a transfer to Hiram Sibley of any of the stock of said company.

GEO. P. ERWIN.

Sworn and subscribed before me March 18th, 1879.

JNO. W. PAYNE,
Commissioner.

Exhibits Nos. 1, 2, 3, 4, 5 and 6 are filed by defendant in obedience to notice to produce and file said letters mentioned in the notice.

JNO. W. PAYNE,
Commissioner.

167 And afterwards, to wit, on the 8th day of March, 1879, the following notice to produce letters is issued, and the following response to said notice and exhibits therewith are filed in said cause, which said notice, response and exhibits are in words and figures as follows, to wit:

168 *Notice to produce Letters.*

In Circuit Court of United States, Western District of North Carolina.

HIRAM SIBLEY ET AL.
against
MRS. ROXANA SIMONTON, EXECUTRIX of R. F. Simonton. } In Equity.

To Luke Blackmer, J. S. Henderson, and J. M. McCorkle, or either of them, att'ys of record for defendant.

You are hereby notified and required to produce and file with the undersigned, within eight days from the date of the service of this on you, as a part of the proof on behalf of the complainants, the letters of Lancaster, Brown & Co., of New York, to Robert F. Simonton, the testator of the defendant, dated at any time between the 19th day of June, 1872, and the first day of January, 1876, relating to the adventure in the Western North Carolina bonds and especially the letters of the following dates received by the testator, R F. Simonton, of whose estate your client, Mrs. Roxana
169 Simonton, is executrix, to wit: Aug. 10, 1872, Dec. 27, 1872, Oct. 5th, 1872, Dec. 24th, 1874, and Dec. 17, 1875.

And your are further notified to appear before me at the court house in Salisbury, N. C., on Tuesday, March 18th, 1879, at 10 o'clock A. M., with your proofs in the cause, when and where I shall proceed to record such proof, as may be presented in above entitled cause in behalf of the defendant. March 8th, 1879.

[SEAL.] JNO. W. PAYNE,
Commissioner.

170 *Response to notice to produce Letters.*

SALISBURY, *March 15th*, 1879.

To JOHN. W. PAYNE, ESQ.
Referee, &c.

In reply to the notice served on me on the 13th inst., in the case of Sibley vs. Simonton, I now file with court the following letters from Lancaster to Simonton, to wit:

Letter dated June 26, '72.
" " Dec. 27, '72.
" " Jan'y 13, '73.
" " Jan'y 27, '73.
" " Nov. 16, '74.
" " Dec. 24, '74.

These letters are all that I have in my possession; they were found scattered in various places among Mr. Simonton's papers, there being no file of them among his papers. I searched for them some time during the year past, after a notice had been served on me that I would be called on to produce and file such letters. I do not suppose that any other letters between the
171 parties named were in existence at the time of Mr. Simonton's death.

Very respectfully,

LUKE BLACKMER.

172 *Exhibit No. 1.*

NEW YORK, *June 28th*, 1872.

COL. R. F. SIMONTON,
Statesville.

DEAR SIR: Enclosed we hand you duplicate contract in matter of W. N. C. R. R. Col. Tate will doubtless explain to you, if he has not already done so, the even and favorable turn which things have taken. All the minor details are understood and agreed upon, and we are now only waiting for the lawyers to draw up contract. All will be satisfactory I think, but all depends upon the *strictest* secrecy regarding the whole matter, so we must impress upon you the importance of saying not a *word* about it.

Yours truly,

LANCASTER, BROWN & CO.

173 *Exhibit No. 2.*

NEW YORK, *Dec.* 27, 1872.

COL. R. F. SIMONTON,
Statesville, N. C.

DEAR SIR: Your favor of the 12th inst. has been unintentionally

overlooked. The W. N. C. R. R. bonds have been sold to the Security Co., and they have paid Mr. Sibley $100,000 in security stock on account. The other payments to be made from proceeds of new bonds after foreclosure of road. The whole matter, therefore, is now in their hands, and Mr. Sibley is only interested in having the road promptly sold, and we think the Security Co.'s interest is in the same direction. We were informed a few days ago that an injunction had been asked for, but we do not know from what quarter the opposition comes.

Yours truly,

LANCASTER, BROWN & Co.

174 *Exhibit No. 3.*

NEW YORK, *Jan'y 13th*, 1873.

DEAR COL.:

We were sorry, as well as surprised, to learn a few days ago that the sale of the W. N. C. Road had been postponed until the 22nd Feb'y. We, to-day, learn that there is reason to believe that serious trouble and embarrassments to us might be caused by the action of the governor and the legislature; we cannot believe it, but are told that Col. Tate has not made the efforts which he might have made towards bringing the road to a speedy sale; we write to you, knowing your intimacy with him, to urge you to see him and impress upon him the importance of stirring himself to try and defeat any legislative action, such as we understand the governor will recommend. Can't you and he get up a delegation from the line of the road to go to Raleigh and impress upon the legislature the
175 fact that so much money has been expended on the work that there is no *possible* chance of finishing the road except through a foreclosure, and that it is for the interest of the state, as well as the section of country through which the road passes; that the work should be completed *at once*, instead of the road being 'tied up' by litigation until it is so run down that no one will undertake to complete it. This, it seems to us, might do *much good*. If things are as they seem to us at this distance, the Democratic members might be brought over to our side by showing them that the consequence of litigation would be to throw the road into the hands of the gov. who would use it as a political machine to perpetuate the rule of the Republican party. *Do all that you can to have the sale made on* 22 prox., as you and ourselves are in danger of loss if things go wrong, and as he is growing uneasy and impatient, Mr. Sibley may require that we make some payment as
176 margin to him. Are Phillips & M. exerting themselves as they *should do*, or is Phillips in sympathy with the governor.

Let us hear from you at your *earliest* convenience, as we are uneasy at the state of affairs. Yours truly,

LANCASTER, BROWN & CO.

COL. R. F. SIMONTON,
Statesville, N. C.

177 *Exhibit No. 4.*

NEW YORK, *Jan'y 27th*, 1873.

Col. R. F. SIMONTON,
Raleigh, N. C.

DEAR SIR: In reply to your telegram received on Saturday, we wired you, "If you are doing all you can to hasten sale you needn't come; we will write you at Raleigh." We neglected to write on Saturday. It is useless for us to impress on you the *great* importance, to you as well as ourselves, of having the sale of the road speedily consumated. We are doing all we can at this end of the line to effect our object by bringing political influence, &c., to bear. We regret that Col. T. is sick, but trust that you will remain at Raleigh and watch every point carefully, and use all the influence which you can bring to bear upon the legislature. We have received a copy of the governor's letter to the legislature. He claims that the mortgage is illegal, and made in direct violation of
178 the act of the legislature, and yet he has signed the certificate on a very large nnmber of the bonds, certifying that the bond is a 1st mortg., &c. This might be used at the proper time and in the proper way. If the people along the line of the road want the work pushed, can't a petition be gotten up at once requesting the legislature not to litigate the mortgage, but to allow the road to be sold, as in that way *only* it can be built. You can assure parties that work will be begun and vigorously prosecuted just as soon as possession of the road is obtained. Do *all* that you can. Let us know if we can aid you in any way, and keep us advised, over wires if necessary, of anything of importance.

Yours truly,

LANCASTER, BROWN & CO.

179 *Exhibit No. 5.*

NEW YORK, *Nov. 16th*, 1874

R. F. SIMONTON, Esq.,
Statesville, N. C.

DEAR SIR: Mr. Sibley has sold his interest in the W. N. C. R. R. to Edward Mathews, Esq'r. I think it would be well for you to see Mr. S. He will be here again within a week. Can you come on?

Yours truly,

R. A. LANCASTER.

180 *Exhibit No. 6.*

NEW YORK, *Dec. 24th*, 1874.

COL. R. F. SIMONTON,
Statesville, N. C.

Dear Sir: Your favor of the 22nd inst. to hand this morning. I regret that the mistake should have been made in writing Statesville for Charlotte. Not seeing you at the depot I supposed you were absent from home, and that it would be useless to make an effort to see you on my return. Though I would have notified you had I supposed I would have to spend the whole day in Charlotte, as I did on my return from Alabama. Mr. Sibley sold out to Mr. Mathews for $270,000, but in order to induce him to purchase had to lend him $200,000. We enclose a statement showing figures, as near as we can give them, of your indebtedness to Mr. Sibley and to ourselves, growing out of that transaction. To Mr. Sibley you will owe $14,364; to us $1,292.46. And Mr. Sibley will have to transfer
181 to you upon the payment of the aggregate amount, say $15,656.46, $75,000 of Southern Railway Security stock. That amount of that stock cannot be sold now to realize as much as $15,000, but it is said that it is intrinsically worth 25 cents in the dollar. We have written Mr. Sibley to send us his account against you, which I will send you as soon as received, but I don't think it will vary materially from that which I enclose.

Yours truly,

R. A. LANCASTER.

And the following notices to defendant's attorney, T. S. Tucker, and to defendant to produce letters, are issued in said cause, which said notices, and the marshal's return thereon, are in the words and figures, as follows, viz:

182 In Circuit Court of United States, Western District of North Carolina.

HIRAM SIBLEY ET AL. *against* ROXANA SIMONTON, EXECUTRIX of R. F. Simonton.	In Equity.

To T. S. Tucker, one of the att'ys of record for defendant:

You are hereby notified and required to produce and file with the undersigned, within eight days from the date of the service of this on you, as a part of the proof on behalf of the complainants, the letters of Lancaster, Brown & Co., of New York, to Robert F. Simonton, the testator of the defendant, dated at any time between the 19th of June, 1872, and the first day of Jan'y, 1876, relating to

the adventure in the Western North Carolina bonds, and especially the letters of following dates, recorded by the testator, R. F. Simonton, of whose estate your client, Mrs. Roxana Simonton, is executrix, to wit: Aug. 10th, 1872; Dec. 27, 1872; Oct. 5, 1872; Dec. 24, 1874; and Dec. 17th, 1875.

183 And you are further notified to appear before me, at the court-house in Salisbury, N. C., on Tuesday, March 18th, 1879, at 10 A. M., with your proofs in the cause, when and where I shall proceed to record such proofs as may be presented in above-entitled cause in behalf of the defendant.

March 8th, 1879.

[SEAL.] JNO. W. PAYNE,
Referee.

Marshal's Return.

Executed by delivering a copy hereof to T. S. Tucker, att'y, M'ch 17, 1879.

R. M. DOUGLAS, *U. S. Marshal.*
By S. O. GRAHAM, *D. M.*

184 *Notice to Mrs. Simonton to produce Letters.*

Circuit Court of United States, Western District of North Carolina, at Greensboro.

HIRAM SIBLEY ET AL.
vs.
ROXANA SIMONTON, EXRX. OF R. F. Simonton.

To Roxana Simonton, executrix of R. F. Simonton, dec'd:

Your are required to produce and file with the undersigned, within ten days from the service of this on you, as a part of the proof on behalf of the complainants, the letters of Lancaster, Brown & Co., of New York, to Robert F. Simonton, your testator, dated at any time between the 19th day of June, 1872, and the first day of January, 1876, relating to the adventure in the Western North Carolina bonds, and especially the letters of following dates received by your testator, viz: August 10th, 1872, December 27th, 1872, October 5th, 1872, December 24th, 1874, and December 17th, 1875.

Feb'y 21st, 1879.

[SEAL.] JNO. W. PAYNE, *Clerk.*

185 *Marshal's return to notice.*

Due search made and Roxana Simonton not to be found. From best information she is in the State of Mississippi.

R. M. DOUGLAS, *U. S. M.*
By H. C. COWLES, *S. D. M.*

And the following subpœnas are issued in said cause, which subpœnas and the marshal's return thereon, are in words and figures following, viz:

186 *Subpœna for R. Y. McAden.*

Circuit Court, 4th Circuit. October Term, 1879.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA.

The President of the United States of America to the marshal of the aforesaid district, greeting:

You are hereby commanded to summon R. Y. McAden (if to be found in your district) personally to be and appear before me, J. W. Payne, commissioner, at the court-house in the city of Salisbury, on the 18th of March next, at 10 A. M., then and there to testify and the truth to say in behalf of the defentant, in a certain matter therein pending, wherein Hiram Sibley et al. are plaintiffs, and Mrs. Roxana Simonton, executrix, is defendant. And this you shall in nowise omit, under the penalty prescribed by law, and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, at Greensboro, in said district,
187 the first Monday, in February, 1879, and in the one year of the independence of the United States. Issued the 22d day of February, 1879.

[SEAL.] JOHN W. PAYNE, *Clerk.*

Marshal's Return.

Received March 1, 1879. Executed March 1st, 1879, by reading the within subpœna to R. Y. McAden, at Charlotte.

R. M. DOUGLAS,
U. S. Marshal.
By A. C. SUMMERVILLE, *D. M.*

188 *Subpœna for S. McD. Tate and G. P. Erwin.*

Circuit Court, 4th Circuit. Oct. Term 1879.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA.

The President of the United States of America to the marshal of the aforesaid district, greeting:

You are hereby commanded to summons S. McD. Tate and G. P. Erwin, Sec. of Western N. C. R. R. Co., and bring with him the stock book containing a list of all the stock owners in said company, Eastern Division, since 1865, (if to be found in your dis-

trict), personally to be and appear before me, J. W. Payne, commissioner, at the court-house in the city of Salisbury, on the 18th March next, at 10 A. M., then and there to testify and the truth to say, in behalf of the defendant, in a certain suit therein pending, wherein Hiram Sibley et al. are plaintiffs and Mrs. Roxana Simonton, executrix, is defendant.

And this you shall in nowise omit, under the penalty prescribed by law, and have you then and there this writ.

189 Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, at Greensboro, in said district, the first Monday in February, 1879, and in the one year of the independence of the United States.

Issued 22 day of Feb'y, 1879.

[SEAL.] JNO. W. PAYNE, *Clerk.*

Marshal's Return.

Executed March 1st, 1879.

R. M. DOUGLAS, *U. S. M.*
By W. R. MYRES, JR., *D. M.*

And afterwards, to wit, at the regular October term, 1879, of this court, a report of the referee in said cause is filed, which report is in words and figures following, viz:

190 *Report of Referee.*

In the Circuit Court of U. S., Western District of North Carolina.

HIRAM SIBLEY AND OTHERS
against
MRS. RAXANA SIMONTON, EXECUTRIX OF R. F. SIMONTON. } In equity.

Report.

The undersigned, having been appointed a commissioner in the above-entitled cause, would respectfully report to the court: That the depositions of Hiram Sibley, the plaintiff, R. A. Lancaster, of the late firm of Lancaster, Brown & Co., of the state and city of New York, and J. C. Mabin, of the aforesaid firm, have been, after publication, filed in the cause with the exhibits therein referred to as proofs, which are made a part of my report.

I have further to report, that after due notice, the counsel of the plaintiffs and defendants being present, I recorded the proofs herewith filed, marked "M," which is filed as part of my report.

191 I find from Exhibit "B," referred to on page 8 of Hiram

Sibley's depositions and filed, that there was a written agreement entered into on the 19th of June, 1872, between Hiram Sibley, the plaintiff, R. F. Simonton, the testator of defendant, Roxana Simonton, and Lancaster, Brown and Company, of the state and city of New York, by which said written agreement Hiram Sibley sold to R. F. Simonton, testator aforesaid, one-half interest in $1,057,000 of the first mortgage bonds of the Western North Carolina Railroad Company, and also one-half interest in 8,158 shares of the capital stock in aforesaid company for the sum of one hundred and thirty-five thousand six hundred and thirty-three dollars, purchase money becoming due March 14th, 1873. Also said Sibley sold to the aforesaid company (Lancaster, Brown & Co.) one-fourth interest in said bonds and stock for $67,817, purchase-money becoming due March 14th, 1873. By said con-
192 tract Sibley, the plaintiff, was authorized to employ counsel and foreclose the mortgage. See Exhibit "B."

I further find there was a written contract entered into on the 7th of November, 1872, between Hiram Sibley, the plaintiff, R. T. Wilson, and the East Tennessee, Virginia and Georgia Railroad Company. See Exhibit "A" in depositions of Hiram Sibley, page 3, by which contract Sibley sold the aforesaid bonds and stock, as he was authorized to do in Exhibit "B," for the sum of $370,000, which contract failed by the terms not being fulfilled as agreed between . See Exhibit "A" and page 12 of plaintiff's deposition. I further find that the plaintiff received dividends amounting to $3,500, one-half of which was credited on the account of R. F. Simonton. See Exhibit "F" and page 13 of plaintiff's deposition.

I further find that afterwards, to wit, on the 27th of Oc-
193 tober, 1874, the plaintiff, Hiram Sibley, contracted and sold to Edward Mathews, of the state, county, and city of New York, the aforesaid mortgage bonds and stock for the sum of $270,000. See Exhibit "G" and page and plaintiffs proofs.

I further find that in the statement of the account as rendered in Exhibit "F," R. F. Simonton is credited with one-half of the aforesaid $270,000, to wit, $135,000, as should have been done by the terms of Exhibit "B."

I adopt the account as rendered in Exhibit "F" as the true statement of accounts between the plaintiff and testator of defendant, $14,252.94. Respectfully submitted.

JNO. W. PAYNE,
Commissioner.

And at said October term, 1879, an order of transfer of said cause is made in the words and figures following, viz:

194 *Order of Transfer.*

In the Circuit Court of U. S., Western District of North Carolina, at Greensboro in aforesaid court.

HIRAM SIBLEY ET AL, *against* ROXANA SIMONTON, EX'R'X of R. F. Simonton. } In Equity.—Order transferring case to Charlotte.

At October term, 1879. Report of referee filed. Upon motion it is ordered that the defendant have 30 days in which to file exceptions to report.

By consent of parties it was further ordered that when the exceptions were filed, they be set down for hearing and transferred to Charlotte, in said district, to be for hearing at the December term of the U. S. Circuit Court at said place.

I, Jno. W. Payne, clerk of circuit court of U. S. at Greensboro, in said district, certify that the foregoing is a correct copy of the order made in the above cause at October term, 1879, of
195 said court, Dec. 19th, 1879.

[SEAL.] JNO. W. PAYNE, *Clerk.*

And afterwards, to wit, November 7th, 1879, the defendant's exceptions to referee's report are filed in the words and figures as follows, viz:

196 *Defendant's Exceptions to Referee Reports.*

United States Circuit Court, 4th Circuit, for the Western District of North Carolina.

HIRAM SIBLEY AND OTHERS *against* ROXANA SIMONTON, EX'RX OF R. F. SIMONTON.

The defendant excepts to the report of the referee in this—

I. That the referee admitted the testimony of Hiram Sibley, Howard Saunders, Robert A. Lancaster, John C. Mebane, and James O. Proudfit, all of whom were incompetent to testify as to any transactions with the defendant's testator, or as to any statement made by deft's testator, as the evidence taken shows that they were interested as well as the exhibits filed show.

II. That he did not charge the complainant, Hiram Sibley, with $100,000 of Southern Railway security stock, with interest at 7 per cent., which the evidence shows the said Sibley received as cash at par value.

197 III. That the referee has allowed the complainant, Sibley, the sum of one-half of 8,158 shares of W. N. C. Railroad stock. Evidence shows he owned no such stock, and that the ref-

eree has charged deft's testator with one-half the value of 8,158 shares of W. N. C. R. R. stock.

BLACKMER & HENDERSON,
TUCKER, FOLK & McCORKLE,
Sols. for Deft.

And afterwards, to wit, at the regular June term, 1881, of our said court, held at Charlotte, the following decree confirming report and appointing special master, is made, entered, and filed in said cause, which decree is in words and figures as follows, viz :

198 *Decree Confirming Report and Appointing Special Master.*

Circuit Court of the United States, Western District of North Carolina. June Term, 1881. In Equity.

HIRAM SIBLEY AND PAUL P. WINSTON, ASSIGNEE of Lancaster, Brown & Co., Bankrupts,
against
ROXANA SIMONTON, EXECUTRIX OF R. F. SIMONTON, deceased.

This cause coming on for hearing upon the report of the master, and the same having been heard, Jones & Johnston, solicitors for complainants, being present, and no counsel for the defendant, it is ordered, adjudged, and decreed by the court that the exceptions taken by the defendant to the interrogatories and the testimony of Hiram Sibley, in so far as they relate to transactions or communications between said Sibley and Simonton, be, and the same are hereby, sustained, and all the testimony covered by said exceptions is ruled out.

It is further declared and adjudged that the other exceptions to said report be overruled, and that the master's report as to the debt due from the defendant's testator to the complainant, Hiram Sibley, be confirmed in all respects; and it is declared and adjudged that the testator of the defendant, Roxana Simonton, was and still is indebted to the said Hiram Sibley in the sum of fourteen thousand two hundred and fifty-two dollars and ninety-four cents, with interest from the thirty-first of October, 1874.

199

This court doth further order and decree that it be referred to E. K. P. Osborn to take an account of what is due to complainant, as aforesaid, and all others, the creditors of Rob't F. Simonton, dec'd, the testator, in the pleadings named, of his funeral expenses and the expenses of administration thus far. And the said master is to cause advertisement to be made in the "Charlotte Observer," and such other papers as he shall think fit, for six weeks, for all the creditors of said testator to come in before him and prove their debts.

200

And it is ordered that the master do take an account of the personal estate of said testator, which come or should have come to hands of the said defendant, as executrix, or to the hands of any other person by her order or for her use.

And if the personal estate shall be insufficient to pay off and discharge the debts of said testator, it is ordered that the said master do enquire and state to the court what real estate the said testator was possessed of at the time of his death, and the value of the said real estate, and also take an account of the rents and profits thereof accrued at the time of and since his death received by said executrix, or which should have been received by her or by any one by her order or for her use.

201 And it is further ordered that said master take an account and report to this court what disposition, if any, was made of the estate of said testator, real or personal, which has come to the hands of said executrix.

And it is further ordered that the said master shall ascertain and report to this court the *pro rata* share of the assets of the estate of the said testator, both real and personal, to which this complainant is entitled in the due distribution thereof.

And it is further ordered that of the creditors if said testator shall make default in coming in to prove their debts by the 1st Monday in October, 1881, they are all to be excluded the benefit of this decree, but the persons so coming in to prove their debts, not parties to this suit, shall contribute to the complainants their proportion of the expenses of this suit.

This cause retained for further orders.

HUGH L. BOND,
June 14, 1881. *C't Judge.*

Filed in office June 14, 1881.

H. C. COWLES, *Clerk.*

202 And afterwards, to wit, at the regular June term, 1883, of our said court, the defendant, Roxana Simonton, through her counsel, D. M. Furches, comes into open court and prays an appeal to the Supreme Court of the United States, which appeal is granted and citation issued and returned executed and filed and case on appeal, and appeal bond in two hundred $\frac{00}{100}$ dollars, executed by J. B. Connelly and approved by the Hon. Robert P. Dick, judge of said district, filed, which said citation, case on appeal, and bond are in the words and figures following, viz:

203 *Case on Appeal.*

In the Circuit Court of the United States, Western District of North Carolina, Fourth Circuit. In Equity.

HIRAM SIBLEY, OF ROCHESTER, AND STATE OF New York, and a citizen of the State of New York, and Paul P. Winston, assignee in bankruptcy of Lancaster, Brown & Co., of Richmond, Virginia, and citizen of the State of Virginia,

against

ROXANA SIMONTON, EXECUTRIX OF ROBERT F. Simonton, of Statesville, North Carolina, and a citizen of the State of North Carolina.

To the Hon. Robert P. Dick, Judge of the Western District of N. Carolina, &c.

The appeal of Roxana Simonton, the above-named defendant and appellant, respectfully showeth—

That on the 5th day of March, 1877, the above-named complainants filed their bill in the Circuit Court of the United States for the Western District of North Carolina and 4th circuit thereof, at the city of Greensboro, North Carolina, against the above-named defendant, Roxana Simonton, executrix of Robt. F. Simon-
204 ton. That the complainants alleged and charged in their said bill that the complainant, Hiram Sibley, being the owner of *one million and fifty-seven thousand dollars* par value of the first mortgage bonds of the Western North Carolina Railroad Company, and *eight thousand one hundred and fifty-eight shares* of the capital stock of said company, on the 19th day of June, 1872, undertook and agreed in writing to sell to the said Robt. F. Simonton, the testator of the defendant, Roxana Simonton, a one-half undivided interest in said mortgage bonds and railroad stock at the agreed price of one hundred and thirty-five thousand six hundred and thirty-three dollars, ($135,633,) and at the same time and in the same written contract, said Hiram Sibley sold to the firm of Lancaster, Brown & Co. one undivided fourth interest in said mortgage bonds and railroad stock for the agreed price of sixty-seven thousand eight hundred and seventeen dollars, ($67,817,) and retained one undivided fourth interest in said mortgage bonds and railroad stock as his own property. And to form a partnership, com-
205 posed of the said Lancaster, Brown & Co., the said R. F. Simonton, testator of the defendant, Roxana Simonton, and the complainant, Hiram Sibley, to foreclose, if necessary, said mortgage on the Western North Carolina Railroad and to sell said railroad thereunder, and to sell said capital stock and mortgage bonds upon adventure and speculation.

That in the said written contract of sale and partnership it is stated that the payments of Lancaster, Brown & Co. for the one-fourth of said bonds and stock, and of the said R. F. Simonton for one-half of said bonds and stock, should become due on the 14th day of March, 1873; that neither Lancaster, Brown & Co. nor

Robt. F. Simonton had any authority to sell said bonds and stock, or any part of the same without the approval of the other parties. Neither was the said Lancaster, Brown & Co. nor the said R. F. Simonton to have the possession of said bonds and stock, but the same was to remain in the possession and control of the said Hiram Sibley; and he was fully authorized and empowed by said contract to sell said mortgage bonds and railroad stock, upon his own motion and judgment, and
206 without consulting either Lancaster, Brown & Co. or R. F. Simonton; that said bonds and stock was to be considered as collateral in the hands of the said Sibley for the payment to him of the agreed price for the interests sold by him to the said Simonton and Lancaster, Brown & Co.; that said Sibley was to sell said bonds and stock and to apply a sufficient amount of the proceeds of said sale to the payment of $135,633 due him by said Simonton, and to $67,817 due him by the said Lancaster, Brown & Co. for the interest sold them in said stocks and bonds as hereinabove set forth. And that if he made sale of said bonds and stock before the 14th day of March, 1873, the said Simonton and Lancaster, Brown & Co. should be entitled to a rebate of seven per centum on said amounts; that after paying off said indebtedness to himself, the necessary costs and charges of foreclosure, and the necessary expenses of making said sales as therein provided for, then the residue was to be divided between the parties as follows: The said Hiram Sibley, one-fourth; Lancaster, Brown & Co., one-fourth; and R. F. Simonton, testator of defendant, Rox-
207 ana Simonton, one-half. That on the next day after this contract was made, to wit, on the 20th day of June, 1877, (or it may have been on the same day, but if so, after the original contract) the parties to the original contract, to wit, Hiram Sibley, Lancaster, Brown & Co., and R. F. Simonton, made and entered into another contract supplemental to the original, in which it is recited that the complainant, Hiram Sibley, has "this day" sold to the said Lancaster, Brown & Co. and the said R. F. Simonton the bonds and stock above named. It is then provided and specially agreed in this supplemental contract of the 20th, that of the *profits* arising from a foreclosure and sale of said bonds and stocks, that $25{,}103\frac{75}{100}$ should be first set apart and divided into three equal parts; and that said Hiram Sibley should have one-third, and the said Lancaster, Brown & Co. one-third, and the said R. F. Simonton the other third thereof. And that from any profits remaining after the first $25{,}103\frac{75}{100}$ there should be paid to the firm of Lancaster, Brown & Co. the sum of $1{,}384\frac{00}{100}$, and to the W. N. C. R. R. Co. the sum of $881\frac{00}{100}$, and that any balance then re-
208 maining of said profits should be divided between said parties as follows: The complainant, Hiram Sibley, one-fourth; Lancaster, Brown & Co., one-fourth; and R. F. Simonton, defendant's testator, one-half thereof. And that in case of *loss* in the ad-

venture, the amount due L., B. & Co. of $1,348\frac{20}{100}$, and the W. N. C. R. R. Co. of $881\frac{27}{100}$, should be paid by each of the parties in proportion to their interests, and in the same proportion any deficiency that may exist in the proceeds necessary to return to the said Sibley the sum of two hundred and seventy-one thousand two hundred and sixty-six dollars; that copies of these two contracts are attached to and made a part of plaintiff's bill of complaint, and are here specially referred and asked to be considered as a part of defendant's case on appeal; that under said contract of sale and partnership with the said Lancaster, Brown & Co. and R. F. Simonton, the complainant, Hiram Sibley, caused proceedings to be instituted in the Circuit Court of the United States in the Western District of North Carolina and 4th circuit, at Greensboro, N. C., against said W. N. C.
209 R. R. Company and others, the trustees thereof, for foreclosure of said mortgage, and sale of said property, and that during the pendency of said suit the said complainant, Hiram Sibley, contracted and sold said mortgage bonds and railroad stock, to wit, on the 7th day of November, 1872, to one Richard T. Wilson, at the agreed price of three hundred and seventy thousand dollars ($370,000,) at which time, and upon said contract and sale, the complainant, Hiram Sibley, received from said Wilson one hundred thousand dollars par value of the capital stock of the Southern Railway Security Company, and receipted said Wilson therefor, as that amount of cash received by him; that said Wilson afterwards failed to pay the other two hundred and seventy thousand dollars ($270,000) as he was to do, forfeited his said contract, and lost the $100,000 capital stock of the Southern Railway Security Company so paid to the complainant Sibley; that the said Richard T. Wilson, having thus failed to comply with his said contract, and there-
210 by forfeited the same, the complainant, Hiram Sibley, on the 27th day of October, 1874, sold and assigned to one Edward Matthews, of New York, said railroad stocks and mortgage bonds, subject to any claim the said R. T. Wilson might have upon the same, under the contract of the 7th of November, 1872, for the sum of two hundred and seventy thousand dollars ($270,000,) which he received in cash. That while the complainants in their bill of complaint allege that the sale to Edward Matthews was on the 31st of October, 1874, the truth of the matter is, as appears from the contract itself on file, that it was on the 27th of October, 1874. And complainants neglect even to mention in their said bill that the complainant, Hiram Sibley, ever made any contract of sale of said bonds and stocks to R. T. Wilson, or that he at that time, to wit, on the 7th day of November, 1872, received of said Wilson the sum of one hundred thousand dollars ($100,000) par value of the stock of the Southern Railway Security Company. Yet the
211 same is true, as appears by the written contract and receipt with said Wilson, signed by himself, bearing date 7th Nov.,

1872, now on file, and acknowledged by said Sibley. And the only mention he makes of any capital stock of said Southern Railway Security Company, is in speaking of the sale to Edward Matthews of the 27th October, 1874. He says: "There was realized and turned over to me, upon said sale of bonds and stocks, $150,000 of the par value of the capital stock of the Southern Railway Security Company, which I hold subject to distribution," &c. When the truth of the matter is, that he did not receive any of the stock of the Southern Railway Security Company in the contract with Edward Matthews. But that he received one hundred thousand dollars thereof from R. T. Wilson at the time, and in the way herein above set forth. And as defendant alleges, then appropriated it to his own use, in part satisfaction of the debt of Lancaster, Brown & Co., and of the said R. F. Simonton, as he was bound to do
212 under the contract of sale and partnership herein above referred to. And that on the 31st day of October, 1874, he received, on said Southern Railway Security stock, a cash dividend of $3,500\frac{00}{100}$, and a stock dividend of 50 per cent., amounting to $50,000, making the whole amount of stock he then held $150,000\frac{00}{100}$. All of which will more fully appear from the pleadings, exhibits and proofs in the suit, and which defendant relies upon in this appeal.

The complainants then allege an indebtedness on the part of the defendant, Roxana Simonton, as the executor of the said R. F. Simonton, her testator, and that she has assets in her hands, or should have, to pay the same, &c. To this bill the defendant, Roxanna Simonton, as the executor of the said R. F. Simonton, on the 7th day of May, 1877, filed her answer, in which she admits the contracts of sale and partnership, as set forth in complainants' bill. Admits that by the terms of said contracts the complainant, Hiram Sibley, was to hold said bonds and stocks as collaterals to secure the price agreed to be paid him by Lancaster, Brown & Co., and
213 by her testator, R. F. Simonton. And that the said Hiram Sibley was thereby authorized to sell the same upon his own judgment and at his own time, and that the said Lancaster, Brown & Co., and the said R. F. Simonton, were not so authorized to sell the same, and that they were not even intrusted with the custody of any of said bonds and stock. And that when the said complainant, Hiram Sibley, should sell said bonds and stocks, that he was to apply the proceeds of such sales, or so much thereof as should be necessary, to the liquidation and payment of the price agreed upon to be paid by said Simonton and Lancaster, Brown & Co. to him for the undivided interests so sold to them. And defendant then alleges that if the said Hiram Sibley did apply said proceeds, or if he had so applied said proceeds, to the payment and liquidation of said debts, that her testator, R. F. Simonton, would have owed him nothing, nor would he have owed the partnership firm anything, nor would she as his executrix owe either the plain-

tiffs or the firm anything. And defendant denies that she,
214 as the executor of the said R. F. Simonton, or in any other way, is indebted to or owes the plaintiffs or said partnership anything upon a fair account and settlement. But the defendant on the other hand alleges and charges in her said answer that the complainant, Hiram Sibley, received one hundred thousand dollars, par value, of the capital stock of the Southern Railway Security Company from R. T. Wilson on the 7th day of November, 1872, of the value of 100,000 dollars in United States currency, or if not of that value, it was worth at least 97½ cents on the dollar; that he received this stock as so much cash, and so receipted for the same; and that he held and treated said stock as his own individual property, as it was, until by lapse of time the same became greatly depreciated, when he tried to throw the loss upon the partnership, and the said Lancaster, Brown & Co., and the testator of defendant, R. F. Simonton; that if the complainant had not so treated and held said stock so received on the 7th November, 1872, as his own, that the law, under the terms of the contract of sale
215 and partnership, would have and did apply the same to the payment of the debt due by the said R. F. Simonton to the complainant Sibley, thereby liquidating and discharging the same *pro tanto;* that this stock thus applied to the payment of said indebtedness, and the 270,000 dollars received from Edward Matthews, would leave nearly one hundred thousand dollars due the firm by the complainant, Hiram Sibley, after deducting proper costs, charges, and expenses. Out of the first $25,103$\frac{75}{100}$ the defendant, as the executrix of R. F. Simonton, is entitled to receive one-third, and that she is entitled to receive one-half of the residue, according to the express terms of the contract of sale and partnership. That defendant filed exception to the interrogatories, and to the testimony taken by plaintiff, the same having been referred to J. W. Payne, to take and state an account; that said Commissioner Payne took and stated an account, finding over fourteen thousand dollars, with interest thereon from the 31st day of October, 1874, until paid, due to the plaintiff, Hiram Sibley, by the defendant, Roxana Simonton, as the executor of R. F. Simonton; that said re-
216 port transferred to the circuit court, at the city of Charlotte, for hearing and further direction, where the same was heard upon the pleadings, proofs, reports, and exceptions thereto, at June term, 1881, when the court overruled all defendant's exceptions, except the exception as to the competency of certain testimony of he plaintiff, Hiram Sibley. Sustained and confirmed said report in all other respects, and on the 14th day of June, 1881, a final decree was passed, signed, and filed, finding and declaring "that R. F. Simonton, testator of the defendant, Roxana Simonton, was and still is indebted to said Hiram Sibley in the sum of fourteen thousand two hundred and forty-two dollars and ninety-four cents, with interest from the 31st day of October, 1874."

And then made a reference, E. K. P. Osborne, as a special master to take an account of the assets in the hands of the deft., belonging to her testators, the rents and profits and value of the real estate belonging to said testator, and of the indebtedness of said estate, &c., &c., and to report to the next term for further orders, &c., as will more fully appear from the pleading, proofs,
217 reports, does not find whether anything is due the other complainant, Paul P. Winston, assignee of Lancaster, Brown & Co., or not. Nor does he find the fact as to whether the complainant, Hiram Sibley, received 100,000 dollars of the par value of the capital stock of the Southern Railway Security Company from R. T. Wilson, on the 7th day of Nov., 1877, its value at that date. And whether the said Sibley in fact received the same as cash, and so receipted for the same, and held and treated said stock as his individual property. And whether he so held and treated said stock as a matter of fact. Whether the law under the contract did not apply the same to the payment of the debt of defendant's testator's debt *pro tanto*. Nor did said Commissioner Payne find any facts as to said stocks, or make any ruling thereon as to the law, as he should have done.

That said commissioner made no direct finding of facts in the matter, but simply adopted the account filed by complainants as true.

That upon the coming in of said report the defendant filed exceptions thereto, and at term of said court the case
218 was exceptions, and from said decree itself, all of which are specially referred to as a part of the appeal.

Wherefore the defendant appeals from said decree, and the rulings and findings therein contained, from the Circuit Court of the United States to the Supreme Court of the United States, and respectfully prays that the decree of said court and the bill, answer, and other pleading, depositions, evidence, exhibits, and all the proceedings in said suit, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear said cause anew, and that said decree of the circuit court and every part thereof may be reviewed and a decree be made declaring that the said Roxana Simonton, executor of R. F. Simonton, recover of the plaintiff, Hiram Sibley, the sum of fifty thousand dollars, with interest thereon, or such other sum as it shall appear to the court, upon a proper, full, true and just account of said sale and partnership transactions, to be due and owing to her, and that she also recover her costs, &c., &c., this 12th
219 day of May, 1883.

D. M. FURCHES,
Solicitor for Appellant.

June 12, 1883.
Appeal allowed.

ROBT. P. DICK, *Judge.*

220 *Citation on Appeal.*

In the Circuit Court of the United States, Western District of North Carolina, Fourth Circuit.

HIRAM SIBLEY AND ANOTHER
against
ROXANA SIMONTON, EX'TR'X of R. F. Simonton. } In Equity.

To Hiram Sibley and Paul P. Winston, assignee in bankruptcy of Lancaster, Brown & Co.

Whereas the defendant in the above entitled suit, Roxana Simonton, executrix of Robert F. Simonton, has lately appealed to the Supreme Court of the United States from a decree lately rendered in the Circuit Court of the United States for the Western District of North Carolina, made in favor of you, the said Hiram Sibley, and has filed the security required by law:

You are, therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 2d Monday of October next, to do and receive what may appear to justice to be done in the premises.

June 12, '83.

ROBT. P. DICK, *Judge.*

Filed June 12, '83. Executed June 13, '83.

221 In the Circuit Court of the United States for the Western District of N. C. 4th Circuit.

HIRAM SIBLEY AND PAUL P. WINSTON, assignee in bankruptcy of Lancaster, Brown & Co.
against
ROXANNA SIMONTON, EXRX. OF ROBERT F. Simonton. } In Equity.

Know all men that we, Roxanna Simonton, as the executrix of R. F. Simonton, and James B. Connelly as surety, are held and firmly bound unto the above named plaintiffs, Hiram Sibley and Paul P. Winston, assignee of Lancaster, Brown & Co., in the just and full sum of two hundred dollars, the payment whereof well and truly be made and done, we bind ourselves, our executors, &c. Witness our hands and seals this the 19th day of May, 1883.

The condition of the above is such that, whereas the above named defendant, Roxanna Simonton, has applied to his Hon. Robt. P. Dick, judge, &c., for an appeal from final decree of the Circuit of the United States for the Western District of
222 North Carolina, passed at the city of Charlotte, in the 4th circuit, on the 14th day of June, 1881, in favor of the plain-

tiffs, Hiram Sibley and Paul P. Winston, assignee, &c., and against the defendant, Roxanna Simonton, Ex'r'x of Robt. F. Simonton, to the Supreme Court of the United States:

Now, therefore, if said appeal shall be granted, and the defendant shall successfully prosecute the same in the Supreme Court of the United States, then and in that event the above bond shall be null and void; but on her failure to so successfully prosecute the same, then, and in that event, the same shall be and remain in full force and virtue for all such cost as shall be awarded against her. This the day and date above written.

J. B. CONNELLY. [SEAL.]

223 I, H. C. Cowles, clerk, do hereby certify that James B. Connelly, the surety to the above bond, is abundantly good and solvent.

H. C. COWLES,
Clerk U. S. Courts.

224 Circuit Court, Fourth Circuit, at Charlotte.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NORTH CAROLINA. }

I, H. C. Cowles, clerk of the Circuit Court of the United States in and for the Western District of North Carolina, at Charlotte, in said district, do hereby certify the foregoing writing to be a full, true, and perfect transcript and exemplification of the record and proceedings in the case of Hiram Sibley and Paul P. Winston, assignee of Lancaster, Brown & Co., bankrupts, against Roxanna Simonton, executrix of Robert F. Simonton, defendant, as fully as the same remain on file and of record in my office and as certified to my office by the clerk of the Circuit Court of the United States for said district, at Greensboro.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of Charlotte, in said district, this the 25th day of September, A. D. 1883.

[SEAL.] H. C. COWLES, *Clerk.*

(Endorsed on cover:) W. North Carolina C. C. U. S. No. 1042. Roxana Simonton, executrix of R. F. Simonton, appellant, vs. Hiram Sibley and Paul P. Winston, assignee in bankruptcy of Lancaster, Brown and Company. Filed 6th October, 1883.

122-220

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 652.

ROXANA SIMONTON, EXECUTRIX, &c.

vs.

HIRAM SIBLEY, &c.

MOTION FOR A CERTIORARI.

The above cause was docketed at the last term, and being so low upon the docket was supposed to require no special attention.

The bill (by Sibley, &c.,) is for an account of a partnership between the plaintiffs and the testator (and devisor) of the defendant (Simonton).

In the course of the proceedings an account of such partnership was taken, and a decree made ascertaining the balance due to the plaintiff at $5,191.35.

Subsequently a report was returned as to assets, &c., and a final decree entered (Dec. 14, '82,) for payment so far as the personal assets extended, ($341,) and for a sale, by com-

missioners, of the real estate, in order to pay the remainder, ($4,850.35); and hereupon (May 12, '83,) an appeal was prayed, (Record, p. 75,) which (June 12th, 1883,) was allowed, (p. 76). Bond approved, Record, pp. 69 and 76.

It is for the matter *subsequent* to the decree, ascertaining the balance due to the plaintiff, Sibley, that a *certiorari* is now moved.

The truth of this statement appears from a copy of such subsequent proceedings that has been duly certified and sent up for information by the clerk of the court below. I have for that purpose filed it in the office of the clerk of this court.

Submitting that the part in which such record is defective is merely formal, although necessary, and that no harm can have come to the appellees or to public business by the delay in not making this application at the last term, I make the motion above indicated.

S. F. PHILLIPS,
for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

No. 97.

SIMONTON, EXECUTRIX, &C.,

vs.

SIBLEY AND OTHERS.

BRIEF FOR THE APPELLANT.

S. F. PHILLIPS,
For Appellant.

JUDD & DETWEILER, Printers.

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OCTOBER TERM, 1886.

No. 97.

SIMONTON, EXECUTRIX, &C.,

vs.

SIBLEY AND OTHERS.

BRIEF FOR THE APPELLANT.

This is a bill (filed in the United States circuit court for Western North Carolina, March 5, 1877,) to settle a partnership, brought by Sibley and one Winston, assignee in bankruptcy of Lancaster, Brown & Co. against the executrix of the deceased partner.

The subject-matter of the partnership was certain *bonds*, ($1,057,000) and *stock* (8,158 shares) of the Western North Carolina Railroad Company, which had been sold by Sibley; and the bill demands a settlement of alleged losses thereabouts.

The only question presented by the appeal is upon an exception to the report below, for not charging Sibley with a certain item ($100,000 or thereabouts) received upon such sale.

The record, therefore, will be referred to in this brief *with particularity* only so far as it concerns that exception.

The bill states that in 1872 Sibley was owner of the bonds and stock aforesaid, and that upon the 20th of June, 1872, the parties formed a partnership for the purpose of speculating therein, whereupon Sibley sold to Simonton a one-half interest in the same at the price of $135,633, *to be due March 14, 1873*, and to Lancaster, Brown & Co., a one-fourth interest at $67,817, *due as above*, retaining the remaining one-fourth for himself:

Sibley was to sell "the whole of the bonds and stock at his discretion, at any time, and apply the proceeds to the payment of said sums;" "a rebate of seven per cent. per annum to be allowed if such payments should be received before the 14th of March, 1873." Sibley also might, "if deemed best by him, proceed to foreclose the mortgage securing said bonds;" and provision was made for the payment of expenses, &c., and also for the distribution (in a special way) of any profits in the adventure, and for any losses by Sibley therein, reckoning the bonds and stock as worth $271,260:

Accordingly, at some time in 1872, a bill was filed by Sibley to foreclose the railroad mortgage, and certain expenses were therein incurred; but the partners finding the foreclosure suit to be slow of progress, in the words of the bill:

"A sale was effected of the bonds and stock above set forth at and for the price of $270,000. But there was also realized and turned over to your orator, Hiram Sibley, upon the sale of said bonds and stock $150,000, par value, of the capital stock of the Southern Railway Security Company, which your orator has held and still holds subject to distribution in accordance with the terms of said copartnership agreement. Your orators further show unto your honors that said capital stock of the said Southern Railway Security Company has no market value." (Record, pp. 3 and 4.)

"After all the assets of said partnership had been fully realized and expended in payment of the debts due by said copartnership there still remained due to your orator, Hiram Sibley, on the 31st of October, 1874, from said partnership a sum amounting at that time, principal and interest, to $28,555.90," of which half is due to said partnership by Simonton; that there is still due to Sibley from the partnership $14,277.95 and interest from October 31, 1874, which amount Simonton's estate owes to said partnership; and to Winston, assignee of Lancaster, Brown & Co., bankrupts, &c., there is due from said partnership, $845.45, &c., which also is due to said partnership by the estate of Simonton:

There are no other debts due from or to said partnership or otherwise than as regards such debts. The affairs of said partnership are wound up, adjusted, and settled:

Simonton died in 1876, &c.:

Demand was made upon Simonton in his lifetime for an account, but this was refused.

The prayer is for a general account of the dealings of the partnership, &c., and for further relief.

Exhibits A and B, filed with the bill, are, so far as important here, as follows:

A, dated at "banking-house of *Lancaster, Brown & Co., New York, June* 19, 1872," p. 6, is in effect that:

Sibley agreed to sell to Simonton one-half the bonds and stock (as stated above in the bill). It then proceeds:

"It is expressly understood that the aforesaid bonds and stock sold to each party are to be considered as held by Hiram Sibley as collateral security for the prompt payment of the said sums of money, and the whole amount of bonds and stock shall be held together, and that neither party to this contract shall sell or in any way dispose of the whole or any part of his interest in the same without consent of all other parties; but Hiram Sibley shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time and apply the proceeds to the pay-

ment of said sums due to him, allowing a rebate at the rate of seven per cent. per annum if the payments shall be thus received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end may employ counsel, the charge for which shall be borne by the parties in interest in proportion to the amount of bonds and stock held by each, and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sums of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by Hiram Sibley as collateral security for the payment of the aforesaid sums, respectively."

Exhibit B, dated "*New York, June* 20, 1872," p. 7, after reciting the above sale, and a further agreement between the parties that from any profits arising from the sale, foreclosure, or any other disposition of said bonds and stock $25,103.75 shall be first set apart to be divided in three equal parts amongst them, and that from any profits remaining there shall be first paid to Lancaster, Brown & Co. the commissions paid by them for sale of bonds and tax, amounting to $1,348.20, and to W. N. C. R. Co. $881.27, and any balance amongst the parties in proportion to their interests, *provides:* "In case of loss in this adventure the amounts due to Lancaster, Brown & Co. of $1,348.20 and to W. N. C. R. Co. of $881.27 shall be paid by each of the parties in proportion to their interest, and in the same proportion any deficiency that may exist in the proceeds necessary to return to the said Sibley the sum of $271,266."

The answer of the executrix admits the adventure, and claims that upon a fair settlement some $100,000 of profits remained to the partnership, &c., &c.

A general *replication* was thereupon filed.

Reference for an account was made July 13, 1877, and after testimony had been taken upon both sides a report was filed November 7, 1879, in which the referee *adopts* an account which had been put in by Sibley as part of his own testimony (p. 47, Exhibit F), by which it appeared that Simonton owed him $14,252.94, with interest from October 31, 1874.

To this report the executrix excepted, amongst other matters, because the referee "did not charge the complainant, Hiram Sibley, with $100,000 of Southern Railway Security stock, with interest at seven per cent., which the evidence shows the said Sibley received as cash at par value."

This was overruled by the court, and upon the 14th of June, 1881, a decree was made in accordance with the report.

[Nothing was said in the report or decree about the claim of the assignee in bankruptcy on behalf of Lancaster, Brown & Co., and this claim, by common consent, seems to have been allowed to drop out of the record.]

For error is assigned the overruling of the exception above set forth.

The bill is for a general account, and it is expressly alleged therein that Simonton had refused to come to such account.

This claim, as is submitted, *opens the whole dealings of the partnership, to be canvassed upon their original merits and footing;* that is, of course, in the present state of the record, their "dealings" are open as far as they bear upon the exceptions and errors alleged.

The pertinency of this suggestion appears by considering that the evidence upon the part of the complainant is mainly devoted to showing that an account of such dealings *was rendered* by Sibley (as well as by Lancaster, Brown & Co.) to Simonton, and that he acquiesced therein; that is, that an account was stated which excludes the exception in question. Sibley's and Lancaster's evidence is directed to this point, and the account (sent to Simonton, *February* 23, 1875, *p.* 47), *adopted* by the referee, and confirmed by the court, is one upon which Sibley, in his deposition, relies for that purpose.

In this connection it is matter of observation that the court should have confirmed such action, although at the same time it sustained an exception by the executrix (exception 1, p. 67, and decree, paragraph 1, p. 68,) to the competency of all this part of *Sibley's* testimony.

Such decree, as is submitted, strikes that account out of the record. The only other foundation for an affirmance of the report upon this point is that *Lancaster* also, in his testimony, states that (December 24, 1874) he sent an account, very much the same, to Simonton (*11th and 12th answers, p.* 34, *and Exhibit No.* 10, *p.* 44), and that he had conversations with Simonton thereabout, "and he made no objection to the account as it was so sent to him."

It is submitted that the account sent by Lancaster was not meant to be an account stated, but only a *rough* of an account. See letter of *December* 24, 1874, in which it was inclosed (*p.* 51, *bottom*), in which it is spoken of as showing figures "*as near as we can give them;*" also, "*We have written to Mr. Sibley to send us his account against you, which I will send you as soon as received, but I don't think it will vary materially from that which I inclose.*"

It appears that Sibley did not send to Lancaster, Brown & Co. such further account for transmission, and, as already said, there is upon the record, after the above action of the court, no evidence of any sort that that account was ever transmitted to Simonton.

And yet the referee adopted Sibley's account, with the result above spoken.

It is also to be remarked in the same connection that Sibley expressly states in the bill to which he made oath, that Simonton had come to no account with him; and as regards Simonton's assent thereto it is to be observed that in a letter put in evidence by the complainants he says (*January* 10, 1876, *p.* 49, *bottom*) that he had "been an invalid all last year"—the year of the transmission of Sibley's account,—and also that he died in 1876.

But this is not all, for, supposing such account stated to be proved, the complainants thereby *have proved themselves out of court.*

Their only ground for appealing to equity is the necessity that they are under for *an account.* If there were an account stated already the jurisdiction at *law* was ample.

In Logan *vs.* Lucas (59 Ill., 237) a bill had been filed for an injunction and an account. The court refused the injunction, and thereupon declined to retain the bill for an account, as it appeared in the bill that an account had been settled, although the balance thereupon appearing had not been paid, saying: "No case is made by the bill for taking an account."

So in White *vs.* Campbell, 25 Mich. 462, it is said that "An account stated becomes an original demand, and amounts to an express promise to pay the actual sum stated." "The effect is said to be much the same as though the debtor had given his note for the balance." (Citing Bass *vs.* Bass, 8 Pick, 187.)

Northern Co. *vs.* Platt, 22 Minn., 413: "To enable the plaintiff to recover upon these as such (*i. e.*, as an account stated) it was necessary that he should declare upon them as such, so that if there were fraud or mistake sufficient to

avoid the effect of a stated account the defendant might have an opportunity to allege it. By relying on his complaint upon the original transaction, and not upon the claim of a stated account, he treats the original transaction as still open for proof."

[*This*, apparently, is a case of pleading under *the* Code. But that sort of pleading is governed substantially by pleading in equity; and in any case the above principle and reasoning stated must apply in equity.]

McCall *vs.* Nave, 52 Miss., 494. A party who declares in *indebitatus assumpsit* upon an open account cannot prove a stated account thereunder. "The *indebitatus* count gives no warning that evidence will be offered to prove an account stated."

Ward *vs.* Farrelly, 9 Mo., App. 370: The pleadings must aver an account stated, or a party cannot prove one: "The pleadings do not aver an account stated, and the referee simply allowed the plaintiffs to prove a case which was not in the record." (This was a suit for *partition of real estate.*)

Rowell *vs.* Marcy, 47 Vt., 627: "The plaintiff cannot present his open account alone and put his claim exclusively upon it, thereby abandoning or repudiating the settlement, and take the chance of a trial before the referee on that basis, and afterwards in court resort to the settlement to enlarge his recovery."

It is therefore submitted, that in addition to the *error* of giving to Sibley practically all the benefit that he had claimed from evidence put in by him as proving an account stated with Simonton (although by ruling out such testimony the court had in effect annulled it), it would be *error* to fall back upon the evidence of Lancaster, or Maben (*p.* 36, 11*th answer*) as establishing such account stated; not only because the paper so sent was on its face (see *letter* accompanying) not

a finality, but because it was not *declared* upon, and if it had been would have insured a dismissal of the bill for want of equity.

That written or other actual acknowledgment of the debt shown by an account rendered is not necessary to establish the existence of an *account stated*, see Freeland *vs.* Heron, 7 Cranch, 147; Wiggins *vs.* Burkham, 10 Wall., 129, and Cooper *vs.* Coates, 21 Wall., 105. This is *elementary*, and prevails (*compte arrêté*) also in the civil law. Darby *vs.* Lastrapes, 28 La. Ann., 605.

Upon this topic, therefore, it is submitted that this bill should have been dismissed. It was impossible for the defendant to take the objection by demurrer, or otherwise before the hearing. Therefore, if the court concludes that the case of the complainants was substantially, as shown by their evidence and contention before the referee, one upon a stated account, it is submitted that the bill should be dismissed *at the hearing* for want of equity, although, of course, the *variance* betwixt the *allegatum* (an open account) and the *probatum* (a stated account) would be to the same effect.

In Seymour *vs.* Long Dock Co., 20 N. J. Eq., 407 (a case of account), the court said that a court of equity, "*in its discretion at the hearing, may dismiss a bill for want of such jurisdiction as is necessary according to the rules usually adopted*," although, if the defendant submits to such jurisdiction, and does not by demurrer or answer raise the question, ordinarily it will not. This is familiar learning.

Supposing, however, that it should be thought that enough appears upon the record to raise a question whether the report and decree may not be sustained upon the pleadings and proofs, regarded exclusively with reference to the original accounts between the parties, the following remarks seem applicable:

In the first place the bill displays a want of candor. It is verified by the oath of *Sibley*. It asks for a general account, and claims to put Simonton in the wrong for not coming to one. And in this supposed state of mind Sibley suppresses any allusion to the only sale that he ever made of the bonds and stock as such, and alleges a sale made subsequently expressly *subject to the real sale* and for *the residue* of Sibley's interest in the bonds and stock, as being that in regard to which alone such account is due or demanded. And *this* when he had been the only active party to such sale, and had been acting at discretion, and was then face to face with the comparatively ignorant executrix of his partner, deceased. The bill says (p. 4, top): "On the 31st of October, 1874, a sale was effected of the bonds and stock above set forth at and for the price of $270,000; that there was also realized and turned over to your orator, Hiram Sibley, upon the sale of said bonds and stock, $150,000, par value, of the capital stock of the Southern Railway Security Company, which your orator has held and still holds subject to distribution in accordance with the terms of said partnership."

This, of course, means that at the sale of 31st Octobe[r], 1874, he received, *as creditor*, $270,000; and also, *as partner*, and for the firm, $150,000 in stock.

But by *Exhibit A* (p. 40), which the defendant proved by Sibley's own evidence as well as by that of others, it appears that upon the 7th of November, 1872, Sibley had already sold these bonds and stocks to one Wilson for $370,000, and had then received of such price $100,000 in the Security Company stock (the additional $50,000 having been a stock dividend received by him as stockholder possibly about the time of the sale of October 31, 1874, but not as part of the consideration of such latter sale: *Sibley, p. 28, 6th interrogatory.*

[MEM.—The time at which this stock dividend was received

is left in doubt, and, as appears from the *calculated obscurity* of his evidence in other such connections, for reasons probably of Sibley's own.]

The sale of November 7, 1872, was the only sale by Sibley of the bonds and stock as such. The sale of October 31, 1874, put forward by him as the true basis of the account demanded, appears plainly by Exhibit A (p. 38) to have been a sale subject to Wilson's rights under the former sale (*p.* 39, *top*); and Sibley (*Ibid*) sells "without recourse or warranty," and makes it "distinctly understood, declared, stipulated, and agreed" that he is to keep the $100,000 in stock "in any event."

Therefore, in case the court shall think that Sibley has by the proof made any case for a general account, it is submitted that such account is to be taken upon the footing of the sale of November 7, 1872—Sibley to be *allowed*, perhaps, in place of the $270,000 remaining due thereupon from Wilson, with interest from that day, the $270,000, *instead*, which he received from Matthews upon the 31st of October, 1874—*i. e.*, a loss of interest for more than 31 months.

The agreement between Sibley, Simonton, and Lancaster, Brown & Co., of June 19, 1872, shows that Sibley retained the stock and bonds as collateral security for the price at which he sold interests therein to the other parties; that neither of the parties were to sell such bonds and stock, or any part thereof, without the consent of the other:

"But Hiram Sibley shall have the privilege of selling the whole amount of both bonds and stock at his discretion at any time, and apply [*not*, apply*ing*,] the proceeds to the payment of said sum due to him, allowing a rebate at the rate of seven per cent. per annum if the payments shall be received before maturity. It is further agreed that Hiram Sibley may, if deemed best by him, proceed to foreclose the mortgage securing said bonds, and to that end may employ counsel, the charge for which shall be borne by the parties in in-

terest in proportion to the amount of bonds and stock held by each, and whatever the proceeds of said foreclosure may be, or, if the bonds are sold, whatever the net proceeds of the sale may be, after paying the said sum of money and expenses of foreclosure, they shall be considered as due to each party in proportion as the bonds and stock are now held, but may be held by Sibley as collateral security for the payment of the aforesaid sums respectively."

By "*the said sums of money*" in the above passage is meant the sums due by Simonton and Lancaster, Brown & Co., for, as will appear by a former part of the agreement (p. 7, top), that very expression is used in reference to these debts just after their specification. This remark may be *ex abundanti*, as the fact appears plain even without such *context*.

It is submitted that Sibley was to sell at any time (whether before or after these debts became payable)—"at any time" that is, before or after March 14, 1873—and that having perfect discretion as to the sale he was bound to apply the proceeds to his debt, so far as needed, and the balance amongst the parties in proportion. As already intimated, the word "apply," in the third line of the above quotation from the agreement of June 19, 1872, is to be referred to the word "shall" in the first line ("*shall have, &c., and [shall] apply*"); whilst, if the writers had intended to connect it with the word "privilege," in the second line, they would have made it "applying."

He did sell, but after holding certain proceeds for more than two years he asserts an option to turn these over to the firm, and without more said to require his partners or debtors to make them good to the extent of any loss to him that his holding of them might have occasioned.

By what authority is this done?

The agreement of 19th June, 1872 (the only material one upon Sibley's theory of *a loss* by him,—as that of the 20th is important only in case the adventure turned out to be

profitable), creates a partnership in a property already held as *collateral*—a partnership, that is, in an anticipated profit after a creditor (Sibley), who was also to be a partner, should have been satisfied. In the meantime that creditor-partner was to hold the property, with privilege to sell, and duty thereupon to pay himself. If he should sell, the partnership had no power to control the proceeds before the satisfaction of his debt, and even he had no power over them *as partner*. The agreement is express for that. It *repeats* that the proceeds of any sale were to be applied to the debt.

It is submitted that Sibley sold in his character *as creditor*. That character was the ground of his *authority*, and the papers which he executed are to the same effect. They witness sales by "Hiram Sibley," and do not purport to be in behalf of a partnership, or even allude to one.

The evidence of McAden is of the same effect. (*Pp.* 54, 55.) This witness is entirely disinterested. His cross-examination shows that Sibley acquiesced in the fairness of the account which he had given of the circumstances attending the sale to Wilson in November, 1872. These circumstances are now relied upon by us as showing that Sibley consciously sold *as creditor*, and that in like manner he took the *stock* of the *Security Company* with a view of himself becoming a stockholder in that company, previously deliberating whether he would, and finally resolving to, accept the stock at $97,500 in place of the supposed trade with Cass as agent for Wilson at $100,000 cash. That the company thought Sibley was buying for himself through their agent, Wilson, is evidenced by the fact that such stock was not then upon the market, they being able to, and preferring to, choose their own associates. (*Tate's evidence, p.* 57.) So Sibley said at the sale: "I will get in with you, and show you how to manage it," &c., &c. And so the transaction stood from November 7, 1872, until December 24, 1874, when for the first time Sibley, through Lancaster, notified Simonton that he would turn over that stock *to the partnership*, he hav-

ing, in the meantime, received a stock dividend upon it of $50,000,—the alleged share of Simonton therein, $75,000, being then said by Lancaster to be salable at only $15,000, although "intrinsically" worth $18,500. (See his letter to Simonton, *December* 24, 1874, *pp.* 51, 52.)

It is now submitted for Simonton, that the account which Sibley demands by his bill required him to credit the adventure on account of the sale of the bonds and stock, with $97,500 as received by him at the sale on the 7th of November, 1872.

Lancaster says that Simonton constituted the firm of L., B. & Co., "his agents in the matter of the sale of said bonds and stock." (*P.* 33, *bottom.*) This statement is improbable, for Simonton had already made the other partner (Sibley) such agent *with unlimited discretion.* He had no use for another agent in the same matter. There was no reason why he should put his head into the separate jaws of each of his partners! *Sibley* required no additional authority; and Lancaster and Simonton together could not control Sibley's action.

The letter of Lancaster to Atkinson, dated August 15, 1873 (*p.* 46, *bottom*) giving advice not to sell the Security stock, is plainly a communication made in their character *as Sibley's bankers,* which the record shows that they were in 1872, and probably had been ever since. (*Tate's evidence, p.* 56.) It is submitted to be a plain afterthought—*preposterous,* in the old as well as in the later sense of that word—for Lancaster and Sibley to claim that such advice was given by the firm *as agents of Simonton.* If either Lancaster or Sibley regarded it as of importance that the firm should have power to bind Simonton as agent, they show that they were prudent enough to have taken some *writing* from him to that effect; at least some letter. But there is none. Yet Lancaster and Sibley were so over-cautious as to take an additional, and

apparently superfluous, power of attorney from Simonton (*dated October* 3, 1874, *p.* 46) authorizing Sibley as of that date to sell the bonds and stock, although his authority under the agreement of June 19, 1872, was still in full force. They were, therefore, plainly not the men to leave this alleged side agency of L., B. & Co. for Simonton to rest in *word of mouth.* In the same connection it is also submitted that the record (correspondence, &c.) shows that if Lancaster, Brown & Co. ever acted as special agents of either of their partners as against the other it was as agents of Sibley. If they were agents *of Simonton,* of what significance towards establishing *an account stated* in favor of Sibley, was his alleged silence *to them* when they forwarded the rough minutes of the account? *Acquiescence* is evidence of an account stated only when it occurs in conduct towards *the creditor himself,* personally or by agent. (1 Gr. Ev. (14th ed.), p. 258, *n.* (*a*)). Lancaster's ready testimony upon that point, whilst it contradicts his allegation that he acted as an agent of Simonton in the matter of the sale, at the same time, for a reason heretofore suggested, falls short of evidencing *an account stated.*

And in this connection, it is further submitted that Simonton's interest as partner in the result of the sales made by Sibley as holder of the collaterals (believing, as he might and should, that the adventure had thereby resulted in a *profit*) was a plain one, and upon that ground justified such a letter as that of April 25, 1874 (record p. 50), *without giving the slightest ground for quoting this as approving of a transfer by Sibley of the* $100,000 *of stock from his own account as the seller of collaterals for his own satisfaction, to an imaginary account with and distribution to his partners, in a firm that had no assets in the case which he averred to be the true one, viz., where there were no profits!*

Both Lancaster and Sibley are disposed to make moan in a general statement (*versantur generalibus*) that Simonton set

this adventure upon foot, and urged its execution. *Tate* gives (p. 56) what no doubt is the simple basis for these highly-colored representations. Tate wished to borrow money upon the stock and bonds as collateral, and L. B. & Co., as bankers, &c., had such money to lend for Sibley. Simonton introduced the parties to each other. The rest, so far as Sibley was concerned (the purchase of the collateral at auction), was natural; a usual result. In the meantime Simonton's representation of the value of such collateral and wish to become a party in interest are amply vindicated by the event; for, excepting mismanagement, the adventure would have been very profitable to all concerned.

We ask that Sibley be charged with $97,500 as of the date November 7, 1872, in addition to the items contained in the report of the referee.

S. F. PHILLIPS.

122-220

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IN THE

Supreme Court of the United States.

October Term, 1886. No.

SIMONTON, APPELLANT,

vs.

SIBLEY, APPELLEE.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

Brief for Appellee, by Mr. Earle.

This is an appeal from the Circuit Court of the United States for the Western District of North Carolina.

The bill in equity was filed March 5, 1877.

The master's report was filed October, 1879.

Decree made and filed June 14, 1881.

Appeal allowed June 12, 1883.

The report of the master will be found on pages 65, 66, and the decree 68, 69 of the Record. Both are short.

It appears that Hiram Sibley sold the appellant's testator, who was a citizen of North Carolina, an undivided one-half interest in $1,057,000 of the first mortgage bonds of the Western North Carolina Railroad Company, and in 8,158 shares of its capital stock, for $135,633; and to Lancaster,

Brown & Co., chiefly Virginians, an undivided one-fourth interest in the same property for $67,816, Mr. Sibley retaining an undivided one-fourth interest. By the agreement Mr. Sibley was to hold the property as collateral security for the payment of these sums. Neither party was to sell or in any way dispose of his interest without the consent of all the other parties; "but Hiram Sibley shall have the privilege of selling the *whole* amount of both bonds and stock at his discretion at any time."

If he made such sale before the maturity of the notes secured by these collaterals, there was to be a rebate of interest. The agreement further provides that Mr. Sibley should foreclose the mortgage against the railroad company, or sell the securities, at his discretion.

It is very clear that Mr. Sibley had "the management of the adventure," as the agent of all the parties in interest, though without compensation, and that the holding of the property as collateral *security* was an *incident* merely of their possession.

This contract (pp. 44, 45) is dated June 19, 1872.

Whilst this contract recites that Mr. Sibley sold these interests to the other parties, from the evidence it appears that the securities were bought of one Tate, a bank president, who could not longer carry them, and that Tate was *introduced by Simonton* (appellant's testatrix), another bank president of the same vicinage.

When Mr. Lancaster was examined in this case his interest in the Simonton "adventure" had passed to his creditors, and he was discharged in bankruptcy. He says (p. 33): "We (L. B. & Co.) joined Mr. Simonton in urging Mr. Sibley to furnish the money for the joint adventure in W. N. C. R. R. bonds and stocks." Simonton first introduced the matter to us. He was the originator of the adventure. He procured the assignment of the stock to Mr. Sibley. He wholly made the negotiation with Tate.

In an authority by Lancaster, Brown & Co., and R. F.

Simonton (appellant's testator) to Mr. Sibley, dated October 3, 1874, (p. 46,) it is recited that they, "*in connection* with Hiram Sibley, Esq., became the *purchaser*" of these securities, "said Sibley furnished the whole amount of money paid," "appreciating his liberality," "being anxious he should recover his money," "we have heretofore left to him the *management* of the *adventure*." They "authorize and *request* him to continue to direct the foreclosure," "or to take such other action by sale" "as may in his judgment appear for the best," "assuring him that whatever course he may deem best will be satisfactory to us."

The testatrix of Simonton now "makes moan" that Mr. Sibley was a creditor selling collaterals.

In the record there are no "assignment of errors and prayer for reversal," nor is there any formal statement of supposed errors in the brief, but the character in which the sales were made seems to be the gravamen of the complaint.

The character in which Mr. Sibley acted is sufficiently established by the above recitals.

The contention of the appellant seems to be that Mr. Sibley sold as a *creditor*, and is liable for $100,000 on account of the capital stock of the Southern Security Company. The evidence upon which this preposterous claim rests is the recital in Col. McAden's testimony (p. 55) of a little pleasantry or badinage of Mr. Sibley's in the dickering between him and Mr. Wilson, and from which it is argued that Mr. Sibley took this stock on his own account.

Mr. Sibley, on November 7, 1872, sold the bonds and stock held for the parties to this suit to Mr. Wilson for $370,000, whereof $100,000 par value, or $97,500 nominal value, was paid in the capital stock of the Southern Security Company, and which was forfeited by Mr. Wilson, as he declined to carry out his contract by paying the remainder of the consideration, to wit, $270,000 in cash. Subsequently, (and it is immaterial whether on October 27

or 31, 1874,) Mr. Sibley sold the joint securities to one Edward Matthews for $270,000, subject to any claim which the said R. T. Wilson might have thereon. This was simply a substitution of Matthews for Wilson. And Mr. Sibley loaned Matthews $200,000, to induce him to make the purchase—of his own money.

There is a material fact in the evidence, however, which shows conclusively that Mr. Sibley did not at *any time* treat the Southern Security Company stock as his own, or as a payment of what was due him, and entirely contradicts the erroneous inference attempted to be adduced from the recital in Col. McAden's testimony. That fact is, that Mr. Sibley received a cash dividend of $3,500 on the Southern Security Company stock, and on March 14, 1873, credited R. F. Simonton with his half thereof and his half of $49 interest thereon. This was shown by the account rendered October 31, 1874. (See, also, Mr. Sibley's testimony, p. 28 of Record.)

And this was all of the money ever received by Mr. Sibley from the Southern Security Company stock in any way, manner, or form.

He urged the sale of it frequently, but Lancaster, Brown & Co. objected (p. 31) both for themselves and Simonton, for whom they were agents in the matter of the sale of the said bonds and stocks (p. 33).

The letter to Mr. Simonton from his agents Lancaster, Brown & Co., dated *Dec'r* 27, 1872, (p. 50) informed him of the receipt of this Southern Security Company stock, and by the testimony of Mr. Lancaster (bottom of 33d and top of 34th pp.) it is shown that Mr. Simonton was fully informed of the transaction with Wilson and of the receipt of this stock, but never at any time did Mr. Simonton suggest the pretension presented by the contention here.

It was after this full knowledge of the transaction that Mr. Simonton made the further power, marked Exhibit D (p. 46).

Jurisdiction.

On page 5 of appellant's brief is the beginning of a very ingenious, but a somewhat disingenuous, argument against the equitable jurisdiction of this cause. It is to be noted that this question was not raised in any way below. The appellant answered on the merits, and the point is now suggested for the first time.

The fallacy in their argument is in this: the appellant assumes that our bill for a general account is dependent upon proof of an account stated, and he loses sight of the fact that the proof of Mr. Simonton's indebtedness to Mr. Sibley in nowise rests upon "an account stated," nor any more upon the portion of Mr. Sibley's testimony which was excepted to by appellant, and which exception is sustained in the decree.

Confused by this misconception, appellant's counsel (p. 6) says "it is matter of observation that the court should have confirmed" the adoption by the referee of the report sent to Simonton February 23, 1875, when it sustained the exceptions of the appellant to the portions of the testimony of Mr. Sibley relating to transactions between himself and Mr. Simonton, then deceased.

It will, however, be noted that at the time of their testimony neither Mr. Lancaster nor Mr. Maben had any interest adverse to the appellant, or any whatever; and in answer to interrogatory 13, on p. 34, Mr. Lancaster testifies to examining this account, and says "the account is correct." Mr. Maben, in answer to interrogatory 13, p. 37, says: "I believe it to be correct *in all* its parts. I *know* the *main items* are correct."

Mr. Lancaster talked over with Mr. Simonton the account, and S. "made no objection to the account as it was sent to him" (Answer to Interrogatory 12, on p. 34).

But this is not all. The following letter speaks for itself:

N. Y., *Dec. 24th*, 1874.

Col. R. F. SIMONTON, Esq.,
Statesville, N. C.

DEAR SIR: Your favor of the 22d inst. to hand this morning. I regret that the mistake should have been made in writing Statesville for Charlotte. Not seeing you at the depot, I supposed that you were absent from home, and that it would be useless to make an effort to see you on my return; though I would have notified you had I supposed I would have to spend the whole day in Charlotte, as I did on my return from Alabama. Mr. Sibley sold out to Mr. Matthews for $270,000, but in order to induce him to purchase had to lend him $200,000.

We enclose a statement showing figures, as near as we can give them, of your indebtedness to Mr. Sibley and to ourselves growing out or that transaction. *To Mr. Sibley you will owe* $14,364, and to us, $1,292.46. And Mr. Sibley will have to *transfer to you* upon the *payment of the aggregate amount*, say $15,656.46, $75,000 of *Southern Railway Security stock.* That amount of that stock cannot be sold now to realize as much as $15,000, but it is said that it is intrinsically worth 25 cents on the dollar.

We have written to Mr. Sibley to send us his account against you, which I will send you as soon as received, but I don't think it will vary materially from that which I enclose.

Yours, truly,
(Signed) R. A. LANCASTER.

It will be remembered that there was no answer to this letter. It was received, however, for it was produced, in response to a subpœna *adduces tecum*, by the appellant.

(See letter of Lancaster to Simonton of December 24, 1874, produced by Mr. Blockner, attorney for appellant. See his letter, p. 59, and the letter, p. 62, as Exhibit 6).

It will be observed that Mr. Lancaster made the balance due by Mr. Simonton to Mr. Sibley a little more than Mr. Sibley. The difference will be accounted for by the charges of interest against himself on account of the cash dividends on the Southern Security Company stock.

NEW YORK, *Dec. 17th*, 1875.

R. F. SIMONTON, Esq.,
Statesville, N. C.

DEAR SIR: Mr. Sibley is here, and seems very much annoyed at not hearing from you in regard to your indebtedness to him growing out of that Western North Carolina Railroad bond transaction. He says he is not inclined to give you trouble, and is willing to make a liberal settlement, *but a settlement he must insist on*, and hopes you will *not force him to bring suit against you.* He requests that you will come on to see him here in regard to the matter, and says you must not think he would take advantage of your presence here to sue you in New York *for the balance due him.* He agrees positively not to take any such advantage, but says, unless you will make a settlement with him, he will be compelled, though reluctantly, *to sue you in North Carolina.*

Yours, truly,

R. A. LANCASTER.

This was some eleven months after the account had been sent him by Mr. Sibley, and it was nearly a year (folio 100, p. 34) after Mr. Lancaster had sent him the statement.

Now, does Simonton say, "I owe you nothing?" By no means. By way, rather, of apology for not acting on the two statements sent him, he says: "I have been an invalid all last year." But let us read the whole letter in this connection:

STATESVILLE, N. C., *Jan'y 10th*, 1876.

R. A. LANCASTER, N. Y.:

Your letter, with Mr. Sibley's request, rec'd. I have been an invalid all last year, and *Col. Tate has all my papers*, and promised me to go to New York, *see you and Mr. Sibley, and make a settlement.* He has not done so. I have forwarded your letter to him. I hope he will attend to this case. *There is no use of a suit; all can be settled without.*

Truly,

R. F. SIMONTON.

When a man is in duty-bound to speak, he must do so, or suffer the inference. Mr. Simonton said naught as to

transaction of which Mr. Tate testifies and "the joint adventure" which Mr. Simonton "introduced" and "originated," according to the testimony of Messrs. Lancaster and Maben.

Nor is there any evidence or any reason to say that Mr. Sibley bought any of these collaterals at auction. It does expressly appear in the evidence of both Mr. Lancaster and Mr. Maben that *Mr. Simonton induced* Mr. Tate to assign the stock to Mr. Sibley in order to get him to buy the bonds.

It is very evident from all the facts of this case that Mr. Simonton was an over-sanguine man, who was especially enthusiastic about the Western North Carolina Railroad. He "originated this adventure," in which he took one-half of the whole interest. His letter of April 25th, 1874, illustrates his unbounded confidence.

When, however, we get down to the last analysis of the facts in this case, we see that Mr. Tate was "unloading" on Mr. Simonton's enthusiasm. Mr. Tate was president of the Western North Carolina Railroad Company. He had indorsed two large notes for it. He wanted to change the transaction. He "went to New York for the purpose of making some arrangements" as to two notes of about $120,000 each. Mr. Simonton introduced him to Messrs. Lancaster, Brown & Co. Subsequently Mr. Tate transferred the stock to Mr. Sibley to enable Mr. Simonton to induce Mr. Sibley to buy the bonds. Mr. Simonton alone wholly managed the negotiation with Mr. Tate.

I submit that there is nothing whatever in the objection to the jurisdiction. Mr. Simonton's estate was insolvent. It had to be marshaled and equitably distributed. An injunction against the disposition of any portion of it by the executrix was necessary, and was granted, and the court at the proper time called in all other creditors in the manner usual in such cases. The act of Congress in connection with the rules as to equitable remedies was considered

more than a half century ago in the case of Boyce *v.* Felix Grundy (3 Peters, 210), and the act was held to be declaratory merely, and was construed in connection with the general rules governing equity jurisdiction. In the much later case of Payne *v.* Hook (7 Wall,-429) you have fully considered all of these features of your jurisdiction involved in anywise in this case.

WM. E. EARLE,
Attorney for Appellee.